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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 75

FORD MOTOR COMPANY, PETITIONER,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 3, 1944.

CERTIORARI GRANTED MAY 29, 1944.

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No.

FORD MOTOR COMPANY,

Petitioner,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M.
ROBERTSON AND FRANK G. THOMPSON, AS AND
CONSTITUTING THE DEPARTMENT OF TREASURY OF THE STATE
OF INDIANA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.



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TRANSCRIPT OF RECORD

In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 8417

FORD MOTOR COMPANY,

Plaintiff-Appellant,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M.
ROBERTSON AND FRANK G. THOMPSON, AS AND
CONSTITUTING THE DEPARTMENT OF TREASURY OF THE STATE
OF INDIANA,

Defendants-Appellees.



Appeal from the District Court of the United States for
the Southern District of Indiana, Indianapolis Division.

THE GUTHRIE-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

TRANSCRIPT OF RECORD FILED SEP. 25, 1943.
PRINTED RECORD.

In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. **8417**

FORD MOTOR COMPANY,

Plaintiff-Appellant,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M.
ROBERTSON AND FRANK G. THOMPSON, AS AND
CONSTITUTING THE DEPARTMENT OF TREASURY OF THE STATE
OF INDIANA,

Defendants-Appellees.

Appeal from the District Court of the United States for
the Southern District of Indiana, Indianapolis Division.

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1 Pleas of the District Court of the United States for the Southern District of Indiana, at the United States Court House in the City of Indianapolis, in said District, before the Honorable Robert C. Baltzell, Judge of said District Court.

Ford Motor Company,

vs.

Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Department of Treasury of the State of Indiana.

No. 117 Civil.

Be It Remembered that heretofore to wit: at the May Term of said Court, on the 7th day of June, 1939, Before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings in the above case were had, to wit:

Comes now the plaintiff by its attorneys and files complaint in the above entitled cause, which complaint is as follows:

Complaint.

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Southern District of Indiana,

Indianapolis Division.

Ford Motor Company,

*Plaintiff.**vs.*

Department of Treasury of the
State of Indiana, M. Clifford
Townsend, Joseph M. Robertson
and Frank G. Thompson, as and
constituting the Department of
Treasury of the State of Indiana,

Defendants.

Civil Cause
No. 117.

COMPLAINT.

(Filed June 7, 1939.)

Comes now the plaintiff and complains of the defendants, and for cause of action alleges that:

1. Jurisdiction is founded upon diversity of citizenship and amount. Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Dearborn in the State of Michigan. Defendant, Department of Treasury of the State of Indiana, is an executive Department of the State of Indiana vested with the enforcement and application, through an administrative division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act of 1933 (Chapter 50, Acts of 1933), as amended by the Acts of 1937 (Chapter 117, Acts of 1937). Defendants, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, are each citizens and residents of the State of Indiana and of the County of Marion, and together constitute the Board of Department of Treasury of the State of Indiana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

2. Jurisdiction is also founded on the existence of a federal question and amount in controversy. The tax sought to be recovered is alleged to have been illegally assessed under Article I, Section 8 of the Constitution of the United States and Amendment 14 of the Constitution of the United States, and the matter in contro-

versy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00).

3. Plaintiff has been improperly charged with such tax under the terms and provisions of the Indiana Gross Income Tax Act of 1933, as amended, and has been required to pay the same. The amounts improperly charged were collected upon plaintiff's gross receipts from January 1, 1935 to April 15, 1939. The aforesaid amounts, together with the amounts of interest improperly collected thereon, are as follows, to-wit:

	1935	1936	1937	1938
Tax	\$26,656.81	\$21,980.93	\$31,523.16	\$7,371.15
Interest	10,854.72	5,848.17	3,734.11	294.85
	1939 (1st Quarter)		Total	
Tax	\$4,442.80		\$ 94,974.85	
Interest	66.64		20,798.49	
			\$115,773.34	

The total tax and interest improperly collected from plaintiff during such period is One Hundred Fourteen Thousand Seven Hundred Forty-two Dollars and Eighty-six Cents (\$114,742.86). Plaintiff within one year prior to the institution of this action had filed with the Department of Treasury petitions for refund in proper form, seeking to recover all of the foregoing tax and interest. Prior to the commencement of this action, the defendant, Department of Treasury, had denied said petitions for refund and had notified plaintiff thereof in writing. Defendants have refused to pay plaintiff said tax and interest improperly assessed against plaintiff and which plaintiff has been required to pay.

4. 4. The tax sought to be recovered by plaintiff in the aforesaid petition for refund was assessed on receipts of plaintiff from January 1, 1935 to April 15, 1939 arising from the following course of business pursued during that period:

(a) Plaintiff is engaged in the business of manufacturing and selling automobiles, trucks and parts. Its principal manufacturing establishment, home office and principal place of business is located at Dearborn, in the State of Michigan. Plaintiff does not maintain within the State of Indiana any establishment or factory at which its prod-

ucts are manufactured or assembled, but all of the products distributed in Indiana are either manufactured and assembled at Dearborn, Michigan, or assembled at branches of the plaintiff at Chicago, Illinois, Cincinnati, Ohio and Louisville, Kentucky. All of the products of plaintiff are sold to the ultimate consumers by independent dealers who have contracts with plaintiff, which were executed subject to the approval of plaintiff's Dearborn office, and such dealers by such contracts are assigned to place their orders with, make remittances to, and receive service from, a certain designated branch of plaintiff which has the territory in which the dealer is located. Plaintiff maintains at Indianapolis, Indiana, a branch through which contacts are made and service rendered to dealers located in a certain territory hereinafter described that is served out of such branch. All of the dealers in the State of Indiana are assigned to plaintiff's branches at either Indianapolis, Indiana, Chicago, Illinois, Cincinnati, Ohio, or Louisville, Kentucky.

(b) The branches with which the dealers are connected were established and have since been maintained because of geographical and business advantages that make the service of dealers in the established territory more advantageous to the plaintiff from the standpoint of cost
5 and of facility of service. The territory in Indiana in which the dealers located therein have contracts with the branch at Chicago, Illinois, comprise the counties of Lake, Porter, Laporte, St. Joseph, Elkhart, Kosciusko, Marshall and Starke. The territory in Indiana in which the dealers located therein have contracts with the branch at Cincinnati, Ohio, comprise the counties of Franklin, Ripley, Dearborn, Ohio and Switzerland. The territory in Indiana in which the dealers located therein have contracts with the branch at Louisville, Kentucky, comprise the counties of Warrick, Dubois, Orange, Washington, Jackson, Scott, Clark, Floyd, Harrison, Crawford, Perry and Spencer. All other dealers of the plaintiff in all other counties in the State of Indiana are dealers of the Indianapolis, Indiana, branch. Also the dealers in Douglas, Edgar, Coles, Clarke, Cumberland, Jasper, Crawford and Lawrence counties in the State of Illinois are dealers of the Indianapolis branch. The branches at Chicago, Cincinnati and Louisville also have dealers in territory outside of the State of Indiana. The allocations of dealers

to the respective branches of the plaintiff above described at Chicago, Cincinnati, Louisville and Indianapolis were made long prior to the enactment of the Indiana Gross Income Tax Act of 1933, and have been continued without change since the enactment of that Act. Plaintiff's dealers served by the branches at Chicago, Cincinnati, Louisville and Indianapolis on the execution of their original contracts with the plaintiff, make all their contacts with, and by their contracts are designated as, dealers of the respective branch in whose territory they are located. Plaintiff does not have the facilities or employees in the State of Indiana to serve all of its Indiana dealers out of the Indianapolis branch. The method of sale and distribution of taxpayer's products in Indiana has been carried on in the same manner since the enactment of the

Gross Income Tax Act of 1933, as was done prior to 6 that time, and no material change in the operation of plaintiff's method of doing business with respect to the sale and distribution of its products in the State of Indiana has been effected since the enactment of said Act, except as hereinafter stated.

(c) The following is the regular course of business: The dealers on or before the 10th of each month file with their branch an order form stating the quantity and type of cars and trucks desired for the next succeeding month or otherwise advise the branch of their requirements. The respective branches assemble and tabulate this data, and on or before the 14th of each month advise plaintiff's Dearborn office of the estimate of the requirements of the entire branch territory as to number and type of cars and trucks desired for the succeeding month by the branch, and requesting in those cases, such as Indianapolis, where no cars or trucks are assembled, the points from which it is desired that the cars and trucks be shipped. On the basis of these reports, which are received at Dearborn, Michigan, from all of plaintiff's branches, production schedules for the next month are made up, and on or about the 23rd of each month, plaintiff advises each of its branches of the cars and trucks allocated to each branch and the point from which shipment of those cars and trucks will be made in the event the branch is not an assembly point. The allotment may be increased or decreased over the branch's request, depending upon production schedules established. Thereafter the branch establishes daily de-

livery schedules to its various dealers on the basis of the allotment. The delivery of cars and trucks to the various dealers in Indiana is accomplished by independent "truck-away" companies that transport the cars and trucks from either the plaintiff's manufacturing establishment at Dearborn or from the assembly branches at Chicago, Cincinnati and Louisville, or as stated in paragraphs 4(c) and

7 4(f) *infra*. All of the cars and trucks delivered are delivered C. O. D. to the dealers, and the truck-away company delivering the products collects from the dealer either checks, cash or securities representing the payment for the products, and remits the same directly to the branch that has the territory in which the dealer is located, regardless of the point of origin of the cars and trucks. The branch upon the receipt of the remittances, immediately deposits them in a special account in a bank in the City where the branch is located which account is subject only to the control of plaintiff's Dearborn office, and advises Dearborn of the deposit. By bank credits and charges the remittances then are placed in Dearborn, New York, Chicago, Detroit or other banks of the plaintiff. All of the gross receipts for trucks or cars delivered to dealers in Indiana of the Chicago, Cincinnati and Louisville branches are received in those respective cities, and none of the gross receipts for such products is ever received by the plaintiff in the State of Indiana or deposited in any bank or trust company in the State of Indiana, but such income and proceeds are received by plaintiff entirely in the respective States of Illinois, Ohio and Kentucky.

(d) All of the dealers of the plaintiff in Indiana have knowledge of the fact that plaintiff has no manufacturing establishment or assembly plant in the State of Indiana, and in placing their orders for cars or trucks contemplate that the cars or trucks will be shipped to them from some point outside of the State of Indiana, which in the case of dealers of the respective out-state branches is generally from such out-state branch, but which in the case of Indianapolis dealers is either from Dearborn or from Chicago, Illinois, Cincinnati, Ohio or Louisville, Kentucky, depending upon the established production schedules.

(e) Occasionally, depending upon the demand for cars and the production schedule of the plaintiff, the supply of cars and trucks will exceed the demands of dealers, and
8 at such time a stock of cars and trucks is shipped to and accumulated at the Indianapolis branch. Dur-

ing and after such short periods of accumulation of cars and trucks at the Indianapolis branch, dealers of the Indianapolis branch are supplied cars and trucks from such Indianapolis branch by the truck-away process above described. The Indiana gross income tax has been paid upon all gross receipts of the plaintiff from all trucks or cars which are so delivered out of the Indianapolis branch to dealers in Indiana after having come to rest at that branch, and no part of the tax sought to be recovered in this case arises from receipts from such source.

(f) In many instances, customers of the dealers in Indiana or the Indiana dealers will go to one of the out-state branches of the plaintiff and there "pick up" cars or trucks. In the cases of customers, such customer selects and accepts delivery of his car or truck at such out-state branch. Likewise a dealer accepts delivery and there pays for the car or truck. The receipts from such deliveries have been included in the receipts assessed as taxable under the Indiana Gross Income Tax Act and are sought to be recovered herein.

(g) In general, the outline of the method of business hereinbefore described applies also to parts manufactured by the Company, and part of the tax sought to be recovered in this case arises upon the gross receipts from parts.

5. (a) During the period from January 1, 1935 to December 31, 1937, the plaintiff has received gross receipts from the sale of cars, trucks and parts to dealers in Indiana of its Chicago, Illinois, Cincinnati, Ohio and Louisville, Kentucky, branches from business conducted in the manner alleged in paragraph 4 of this complaint, upon which an additional tax with interest has been assessed as follows:

	1935	1936	1937	Total
Tax	\$26,656.81	\$19,901.31	\$13,173.18	\$59,731.30
Interest	10,854.72	5,591.95	2,336.13	18,782.80
				<u>\$78,514.10</u>

Plaintiff alleges that the gross receipts upon which the aforesaid tax was predicated are gross receipts derived from business conducted in commerce between states of the United States, and that such receipts under the terms and provisions of Section 6(a) of the Gross Income Tax Act of 1933, and as amended in 1937, are exempt from taxa-

tion by the defendants, Plaintiff further alleges that if said Gross Income Tax Act, when construed according to its true intent, imposes a tax on the gross receipts of plaintiff derived from its business conducted as set forth in paragraph 4 of this complaint on the receipts from the source above stated, then said Act is invalid and void for the reason that such tax constitutes a regulation of and a burden upon interstate commerce and is in violation of Section 8, Article I of the Constitution of the United States. For the foregoing reasons, the plaintiff is entitled to a refund of the tax so assessed and collected upon its gross receipts from the above source.

Plaintiff alleges that the gross receipts upon which the aforesaid tax was predicated are gross receipts derived from activities, business and sources outside of the State of Indiana under the provisions of Section 2 of the Gross Income Tax Act of 1933 and as amended in 1937, and are exempt from taxation by the defendants. Plaintiff further alleges that if said Gross Income Tax Act, when construed according to its true intent, imposes a tax upon the gross receipts of the plaintiff derived from its business conducted as set forth in paragraph 4 of this complaint on receipts from the source above stated and received outside of the State of Indiana, then said Act is invalid and void for

the reason that the State of Indiana has no jurisdiction to impose a tax upon such gross receipts, and the levy of such tax is lacking in due process of law and is in violation of Amendment Fourteen of the Constitution of the United States. For the foregoing reasons, the plaintiff is entitled to a refund of the tax so assessed and collected upon its gross receipts from the above source.

(b) During the period from January 1, 1936 to April 15, 1939, the plaintiff has received gross receipts from the sale of cars, trucks and parts to dealers in Indiana of its Indianapolis branch from business conducted in the manner alleged in paragraph 4 of this complaint where such cars, trucks and parts were delivered directly to the dealers from either Dearborn, Michigan, Chicago, Illinois, Cincinnati, Ohio or Louisville, Kentucky, upon which an additional tax with interest has been assessed as follows:

	1936	1937	1938	1939 (1st Quarter)	Total
Tax	\$2,079.62	\$21,349.98	\$7,371.15	\$1,442.80	\$35,243.55
Interest	256.22	1,397.98	264.85	66.64	2,015.69
					<u>\$37,259.24</u>

Plaintiff alleges that the gross receipts upon which the aforesaid tax was predicated are gross receipts derived from business conducted in commerce between states of the United States, and that such receipts under the terms and provisions of Section 6(a) of the Gross Income Tax Act of 1933, and as amended in 1937, are exempt from taxation by the defendant. Plaintiff further alleges that if said Gross Income Tax Act, when construed according to its true intent, imposes a tax on the gross receipts of Plaintiff derived from its business conducted as set forth in paragraph 4 of this complaint on the receipts from the source above stated, then said Act is invalid and void for the reason that such tax constitutes a regulation of and a burden upon interstate commerce and is in violation of

Section 8, Article I of the Constitution of the United States. For the foregoing reasons, the plaintiff is entitled to a refund of the tax so assessed and collected upon its gross receipts from the above source.

(c) During the period from January 1, 1935 to December 31, 1937, the plaintiff has received gross receipts from the sale of cars and trucks to dealers in Indiana where customers of such dealers or the dealers traveled to plaintiff's place of business at Dearborn, Michigan or its branches at Chicago, Illinois, Cincinnati, Ohio and Louisville, Kentucky, and there selected and accepted delivery of such cars or trucks, and settlement by such dealer was made at the time of the acceptance of such delivery in such other State, all as more specifically alleged in paragraph 4 of this complaint, and upon which an additional tax with interest has been assessed as follows:

	1935	1936	1937	Total
Tax	\$1,179.55	\$1,174.13	\$1,248.99	\$3,602.67

Plaintiff alleges that the gross receipts upon which the aforesaid tax was predicated are gross receipts derived from activities, business and sources outside of the State of Indiana under the provisions of Section 2 of the Gross Income Tax Act of 1933 and as amended in 1937, and are exempt from taxation by the defendants. Plaintiff further alleges that if said Gross Income Tax Act, when construed according to its true intent, imposes a tax upon the gross receipts of the plaintiff derived from its business conducted as set forth in paragraph 4 of this complaint on receipts from the source above stated and received outside of the

State of Indiana, then said Act is invalid and void for the reason that the State of Indiana has no jurisdiction to impose a tax upon such gross receipts, and the levy of such tax is lacking in due process of law and is in violation of Amendment Fourteen of the Constitution of the United States. Plaintiff alleges that the gross receipts upon which the aforesaid tax was predicated are gross receipts derived from business conducted in commerce between 12 states of the United States, and that such receipts under the terms and provisions of Section 6(a) of the Gross Income Tax Act of 1933, and as amended in 1937, are exempt from taxation by the defendant. Plaintiff further alleges that if said Gross Income Tax Act, when construed according to its true intent, imposes a tax on the gross receipts of plaintiff derived from its business conducted as set forth in paragraph 4 of this complaint on the receipts from the source above stated, then said Act is invalid and void for the reason that such tax constitutes a regulation of and a burden upon interstate commerce and is in violation of Section 8, Article I of the Constitution of the United States. For the foregoing reasons, the plaintiff is entitled to a refund of the tax so assessed and collected upon its gross receipts from the above source.

(d) All of plaintiff's gross receipts from all sources described in paragraph 4 of this complaint which were received by the plaintiff from January 1, 1935 to September 30, 1936 accrued, were reported and became taxable under the Gross Income Tax Act of 1933, as the same existed prior to its amendment in 1937, which amendment became effective on April 1, 1937. Plaintiff alleges that the defendants were without right and authority under the provisions of the Gross Income Tax Act of 1933 to assess any portion of the gross receipts of the plaintiff accruing during the aforesaid period with an additional tax for the reason that the defendants did not at any time within two years after the time when the return covering such gross income tax was filed give due notice by registered mail to the plaintiff of such assessment. On the contrary, plaintiff alleges that the notice given by registered mail of the additional assessment against the plaintiff was not given until the 7th day of January, 1939, which time was more than two years after the time when the quarterly and annual returns covering the plaintiff's gross receipts 13 from January 1, 1935 to September 30, 1936 were filed. Plaintiff further alleges that so much of the assessment

as is predicated upon the receipts during such period is invalid and void for the reason that it is lacking in due process of law under the Fourteenth Amendment to the Constitution of the United States. For the foregoing reasons, the plaintiff is entitled to a refund of the tax so assessed and collected upon its receipts during such period.

Wherefore the plaintiff prays a refund of the tax and interest assessed and collected from it in the amount of One Hundred Fifteen Thousand Seven Hundred Seventy Three Dollars and Thirty Four Cents (\$115,773.34), together with interest thereon from the date of payment, and for all other proper relief in the premises.

/s/ Frederick E. Matson,

/s/ Harry T. Ice,

/s/ Louis J. Colombo,

Attorneys for Plaintiff.

Louis J. Colombo,

Detroit, Michigan,

Matson, Ross, McCord & Clifford,

Indianapolis, Indiana,

Of Counsel.

14 (Entry for June 7, 1939, continued.)

And thereupon, there was issued out of the office of the Clerk of this Court a writ of summons for the defendants to the United States Marshal.

15 And afterwards, to wit, at the May Term of said Court on the 27th day of June, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Come now the defendants by their attorneys and file answer, which is as follows:

16 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—117) * *

ANSWER.

Come now the defendants, Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the

Department of Treasury of the State of Indiana, and for answer to the plaintiff's complaint herein state:

1. The defendants admit so much of the paragraph designated as "1" of the plaintiff's complaint as alleges that the jurisdiction is founded upon diversity of citizenship and amount, and that the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business at Dearborn, in the State of Michigan, and that the defendant, Department of Treasury of the State of Indiana, is an executive department of the State of Indiana vested with the enforcement, through an administrative division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act of 1933 (Chapter 50 of the Acts of 17 1933), as amended by the Acts of 1937. (Chapter 117,

Acts of 1937), and the defendants, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson are each citizens and residents of the State of Indiana and of the County of Marion, and that together they constitute the Board of Department of Treasury of the State of Indiana. The defendants further admit that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00), being in the amount of One Hundred Fourteen Thousand Seven Hundred Forty Two Dollars and eighty-six cents (\$114,742.86).

2. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "2" as alleges that the jurisdiction is founded on the existence of an alleged federal question, and amount in controversy, but the defendants deny that the tax sought to be recovered was illegally assessed under Article I, Section 8 of the Constitution of the United States. The defendants further admit that the amount in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00), being in the amount of One Hundred Fourteen Thousand Seven Hundred Forty Two Dollars and eighty six cents (\$114,742.86).

3. The defendants deny that the plaintiff has been improperly charged with the taxes reflected in the plaintiff's complaint under the terms and provisions of the Indiana Gross Income Tax Act of 1933, as amended, but admits that the plaintiff has been required to pay the same. The defendants admit so much of the paragraph designated as "3" of the plaintiff's complaint as alleges that the amounts

in controversy were taxes measured by the plaintiff's gross receipts between the dates of January 1, 1935, and March 31, 1939, and that the aforesaid amounts, together with the amounts of interest collected thereon, are as follows, to-wit:

	1935	1936	1937	1938
Tax	\$26,383.62	\$21,321.67	\$54,425.13	\$7,371.15
Interest	10,854.72	5,848.17	3,734.11	294.85
	1939 (1st Quarter)		Total	
Tax	\$1,442.80		\$93,944.37	
Interest	66.64		20,798.49	
			\$114,742.86	

The defendants further admit so much of the paragraph as alleges that the total tax and interest collected from the plaintiff, measured by receipts received during the period of January 1, 1935, to March 31, 1939, was in the sum of One Hundred Fourteen Thousand Seven Hundred Forty Two Dollars and eighty six cents (\$114,742.86), and that the plaintiff within one year prior to the institution of this action had filed with the Department of Treasury petitions for refund in proper form, seeking to recover all of the foregoing tax and interest, and that prior to the commencement of this action the defendant Department of Treasury had denied said petitions for refund and had notified the plaintiff of such denial in writing. The defendants further admit that the defendants have refused to pay the plaintiff said tax and interest.

4. The defendants admit so much of the paragraph designated as "4" of the plaintiff's complaint as alleges that the tax sought to be recovered by the plaintiff in the petitions for refund mentioned in the paragraph immediately above, was measured by receipts of the plaintiff in the period commencing January 1, 1935, to and including March 31, 1939.

19 (a) The defendants admit so much of the subparagraph designated as "(a)" of the paragraph designated "4" of the plaintiff's complaint as alleges that the plaintiff is engaged in the business of manufacturing and selling automobiles, trucks, and parts, and that the plaintiff's principal manufacturing establishment and principal place of business is located at Dearborn, in the State of Michigan, but the defendants have no knowledge that

the home office of the plaintiff, which is a corporation organized and existing under the laws of the State of Delaware, is located at Dearborn, in the State of Michigan. The defendants, further answering sub-paragraph (a), say that they admit so much thereof as alleges that the plaintiff does not maintain within the State of Indiana any establishment or factory at which its products are manufactured, and the defendants admit that during the period of January 1, 1935, to March 31, 1939, the plaintiff did not maintain within the State of Indiana any establishment or factory at which its products were actually assembled, but the defendants assert that the plaintiff did maintain within the State of Indiana, and at Indianapolis, in Marion County, Indiana, an establishment at which its products could have been assembled and in which the plaintiff maintained facilities for assembling its products; the defendants, further answering the complaint, admit that all of the products distributed in Indiana between January 1, 1935, and March 31, 1939, were either manufactured and assembled at Dearborn, Michigan, or were actually assembled at branches of the plaintiff maintained at Chicago, Illinois, Cincinnati, Ohio, and Louisville, Kentucky. The defendants further admit that all of the products of the plaintiff were sold to the ultimate consumers thereof by 20 independent dealers who have contracts with the plaintiff, which contracts were executed subject to the approval of the plaintiff's Dearborn, Michigan, office, but the defendants deny that such dealers by such contracts are assigned or required to place their orders with, and to make remittances to and receive service from, a certain designated assembly branch of the plaintiff. The defendants, further answering the complaint, admit that the plaintiff maintains at Indianapolis, Marion County, Indiana, a branch through which contracts are negotiated and from which deliveries of the plaintiff's products are made and from which service is rendered to dealers located in a certain territory, but the defendants deny that such contracts are made at Indianapolis, Indiana, and allege that such contracts which were negotiated for were subject to the approval by the plaintiff at the plaintiff's Dearborn, Michigan, office. The defendants further admit that all of the dealers in the State of Indiana are assigned by the plaintiff to the plaintiff's branches at either Indianapolis, Indiana, or Chicago, Illinois, or Cincinnati, Ohio, or Louisville,

Kentucky, but that such assignments are made by the plaintiff and are not made by the dealers.

(b) The defendants, further answering the complaint, say that with respect to the allegation contained in "(b)", "the branches with which the dealers are connected were established and have since been maintained because of geographical and business advantages that make the service of dealers in the established territory more advantageous to the plaintiff from the standpoint of cost and of facility of service", the defendants have no knowledge of the truth or falsity of such statement. The defendants, further answering the complaint, deny that dealers located in Indiana "have contracts With" the branch at Chicago, Illinois, or "have contracts with" the branch at Cincinnati, Ohio, or "have contracts with" the branch at Louisville, Kentucky, but the defendants admit that dealers located in the Counties of Lake, Porter, LaPorte, St. Joseph, Elkhart, Kosciusko, Marshall and Starke have been assigned by the plaintiff to the plaintiff's branch at Chicago, Illinois; and the defendants admit that the counties of Warriek, Dubois, Orange, Washington, Jackson, Scott, Clark, Floyd, Harrison, Crawford, Perry and Spencer have been assigned by the plaintiff to the plaintiff's branch at Louisville, Kentucky; and that the dealers of the plaintiff located in Franklin, Ripley, Dearborn, Ohio, and Switzerland Counties have been assigned by the plaintiff to the plaintiff's branch located at Cincinnati, Ohio; and that all of the other dealers of the plaintiff in all of the other counties of the State of Indiana have been assigned by the plaintiff to the plaintiff's Indianapolis, Indiana, branch. The defendants further admit that the plaintiff's dealers located in Douglas, Edgar, Coles, Clark, Cumberland, Jasper, Crawford and Lawrence Counties in the State of Illinois have been assigned by the plaintiff to the plaintiff's branch located at Indianapolis, Indiana, and further that the plaintiff's branches at Chicago, Illinois, at Cincinnati, Ohio, and at Louisville, Kentucky, have assigned to their care dealers in territory located outside of the State of Indiana. The defendants, further answering the complaint, admit that the schedule of counties by which the allocation of dealers to certain respective branches of the plaintiff, above described, were schedules which were made by the plaintiff prior to the enactment of the Indiana Gross Income Tax Act of 1933, and that said

schedules have been continued without change since the enactment of that Act, but the defendants allege that
22 the allocation of certain specific dealers by the plaintiff to certain of its branches has been made subsequent to the enactment of the Indiana Gross Income Tax Act and that, in the transaction of its business, the plaintiff has delivered its products to its dealers located in Indiana in a manner which did not give effect to the allocation or the schedule hereinabove set forth. The defendants, further answering the complaint, admit that the plaintiff's dealers who had been assigned by the plaintiff to the plaintiff's branches located at Cincinnati, Chicago, Louisville, and Indianapolis, in many instances negotiated their original contracts with the plaintiff through the branches located at Chicago, Cincinnati, Louisville, and Indianapolis, but the defendants allege that such contracts were executed subject to the approval of the plaintiff's Dearborn, Michigan, office, and the defendants deny that such dealers "by their contracts are designated as, dealers of the respective branch in whose territory they are located"; the defendants admit that the plaintiff's dealers, after having executed contracts with the plaintiff, make their contacts with the branch to which the plaintiff assigns them, but the defendants allege that such assignments are made by the plaintiff and that such assignments are not controlled by such dealers. The defendants, further answering the complaint, state that they the defendants have no knowledge with respect to the following allegation: "Plaintiff does not have the facilities or employees in the State of Indiana to serve all of its Indiana dealers out of the Indianapolis branch"; but the defendants allege that the plaintiff has the facilities at its Indianapolis, Indiana, branch to assemble its products, and has facilities at Indianapolis, Indiana to supply such products from the warehouse stores kept
23—there to supply products to dealers within the State of Indiana. The defendants have no knowledge with respect to the truth or falsity of the following statement: "The method of sale and distribution of taxpayer's products in Indiana has been carried on in the same manner since the enactment of the Gross Income Tax Act of 1933, as was done prior to that time, and no material change in the operation of plaintiff's method of doing business with respect to the sale and distribution of its products in the

State of Indiana has been effected since the enactment of said Act”.

(c) The defendants admit so much of the paragraph designated as “4 (c)” of the plaintiff’s complaint as alleges that the plaintiff’s dealers on or before the tenth day of each month file with the branch of the plaintiff to which they have been assigned, an order form stating the quantity and type of cars and trucks desired for the next succeeding month or otherwise advise the branch of their requirements, but the defendants deny that such notification constitutes an order, and the defendants allege that the information contained on such notification is merely an estimate. The defendants admit that the respective branches assemble and tabulate data received from the dealers of the plaintiff, and that on or about the fourteenth day of each month advise the plaintiff’s Dearborn, Michigan, office of the estimates of the requirements of the entire branch territory as to number and type of cars, trucks, and parts desired for the succeeding months by the branch; but the defendants have no knowledge that the plaintiff’s branch offices in those cases where no trucks or cars are actually assembled because of the plaintiff’s decision not to assemble such products at such points, specifically request the points from which it is desired that the cars, 24 trucks, or parts be shipped, and the defendants have no knowledge that in each individual instance, if such specific affirmative requests are made, the plaintiff complies with them; and the defendants have no knowledge as to the truth or falsity of the allegation: “On the basis of these reports, which are received at Dearborn, Michigan, from all of plaintiff’s branches, production schedules for the next month are made up, and on or about the twenty-third of each month, plaintiff advises each of its branches of the cars and trucks allocated to each branch and the point from which shipment of these products will be made in the event the branch is not an assembly point”, or the allegation: “The allotment may be increased or decreased over the branch’s request, depending upon production schedules established”, but the defendants allege that if such allegation is true, the point from which shipment is to be made and the allotment which is increased or decreased is at the option of the plaintiff. The defendants, further answering the complaint, admit that “thereafter the branch

establishes daily delivery schedules to its various dealers on the basis of the allotment", but the defendants allege that in some instances the plaintiff has delivered or caused delivery to be made to certain of its various dealers without having received from such dealers specific orders covering the cars, trucks, and parts delivered; and the defendants further admit that the delivery of cars and trucks to the various dealers in Indiana is accomplished by 'truck-away' companies that transport the cars and trucks from either the plaintiff's manufacturing establishment at Dearborn, Michigan, or from the assembly branches at Chicago, Illinois, Cincinnati, Ohio, or Louisville, Kentucky, or from the warehouse in which the plaintiff stores such property at Indianapolis, Indiana, but the defendants have no knowledge of the truth or falsity of the allegation in

25 the plaintiff's complaint that such "truck-away" companies are "independent"; and the defendants further admit that all of the cars and trucks delivered are delivered C. O. D. to the dealers, and the truck-away company delivering the products act as the agent of the plaintiff in collecting from the dealer either checks, cash, or securities representing the payment for the products at the time of delivery, and that the truck-away company acting as the agent of the plaintiff remits such payment directly to the branch to which the dealer has been assigned by the plaintiff, regardless of the point of origin of the property delivered, and that the plaintiff's branch, upon the receipt of the remittances from the collecting agent, immediately deposit such remittances or payments in a special account in a bank in the city where the branch is located, which account is subject only to the control of the plaintiff's Dearborn office, and advises the plaintiff's office at Dearborn, Michigan, of the fact that the branch has made such deposit in the city in which it is located; it is further admitted that by bank credits and charges the remittances then are placed in Dearborn, Michigan, New York City, New York, Chicago, Illinois, or Detroit, Michigan, banks, and credited to the plaintiff; but the defendants deny that all of the gross receipts for trucks or cars or parts delivered to dealers in Indiana, which dealers had been assigned by the plaintiff to the Chicago, Illinois, or the Cincinnati, Ohio, or the Louisville branches of the plaintiff, were received in those respective cities, and that none of the gross receipts for

such products was ever received by the plaintiff in the State of Indiana or deposited in any bank or trust company in the State of Indiana, and the defendants allege that all of the gross receipts of the plaintiff received as payment for trucks, cars, or parts, delivered by the plaintiff to dealers in Indiana, were received by the truck-away company acting as an agent and for and on behalf of the plaintiff at the dealer's place of business within the State of Indiana; further, the defendants have no knowledge that the gross receipts of the plaintiff derived as payment for trucks and cars delivered to dealers in Indiana were not deposited in any bank or trust company in the State of Indiana, or that such income and proceeds were received by the plaintiff in the States of Illinois, Ohio, and Kentucky.

(d) The defendants, further answering the plaintiff's complaint, and specifically that part designated as "4(d)", admit that the dealers of the plaintiff in Indiana may have knowledge of the fact that the plaintiff has no manufacturing establishment located within the State of Indiana, but the defendants deny that the dealers of the plaintiff in Indiana "have knowledge of the fact that the plaintiff has no . . . assembly plant in the State of Indiana", and the defendants allege that the plaintiff does have an assembly plant located in the State of Indiana at Indianapolis, Marion County, Indiana. The defendants have no knowledge that "in placing their orders for cars or trucks" the dealers of the plaintiff in Indiana "contemplate that the cars or trucks will be shipped to them from some point outside of the State of Indiana", and the defendants further deny that the dealers of the plaintiff in Indiana whose accounts have been assigned by the plaintiff to its Indianapolis, Indiana branch, contemplate that the cars or trucks will be shipped to them from either Dearborn, Michigan, or from Chicago, Illinois, or Cincinnati, Ohio, or Louisville, Kentucky, and the defendants allege that such dealers generally receive delivery, or could receive delivery, from the stocks of property maintained by the plaintiff at its Indianapolis, Indiana, warehouse and branch.

(e) The defendants, further answering the plaintiff's complaint and specifically that part designated as "4(e)", admit that a stock of cars, trucks, and parts was shipped to and accumulated at the Indianapolis, Indiana, branch of the plaintiff, and that during and after such accumulation

of property at the Indianapolis branch, dealers who had been assigned by the plaintiff to its Indianapolis branch were supplied with property from such stock stored at the Indianapolis branch, and that other dealers, both within the State of Indiana and outside of the State of Indiana, were supplied with cars, trucks, and parts from the accumulation of such property at the Indianapolis warehouse or branch, but the defendants respectfully deny that it was only "Occasionally" that the plaintiff maintained such property at its Indianapolis warehouse or branch, and the defendants deny that shipments were made from the stock of property so warehoused at the Indianapolis warehouse branch only during or in "short periods". The defendants further allege that during the time that the plaintiff maintained cars, trucks, and parts at its Indianapolis, Indiana, warehouse or branch, the plaintiff caused delivery of cars, trucks, or parts identical with those warehoused at Indianapolis to be delivered to dealers located within the State of Indiana. The defendants admit that the gross income tax measured by the gross receipts derived by the plaintiff
28 from the sale of trucks, cars, and parts which were delivered out of the Indianapolis branch to dealers in Indiana has been paid and that no part of the tax sought to be recovered in this case was measured by the gross receipts derived from such source within the State of Indiana.

(f) The defendants, further answering the plaintiff's complaint and particularly that part designated as "4(f)", admit that in some instances customers of the dealers of the plaintiff in Indiana, or the Indiana dealers of the plaintiff, would travel to one of the plaintiff's branches located at points outside of the State of Indiana and there "pick up" cars or trucks, and that in the case of customers of dealers of the plaintiff, such customer accepts delivery of his car or truck at such out-of-the-State of Indiana branch of the plaintiff, and that likewise Indiana dealers of the plaintiff who travel to branches maintained by the plaintiff at points outside of the State of Indiana in certain instances accept the delivery at such out-state branch of the plaintiff and there paid for the car or truck, but the defendants do not have knowledge of the specific number of such instances nor of the total gross receipts received by the plaintiff as payment for its cars, trucks, or parts in such instances; and the defendants deny that the

receipt from the deliveries described immediately above have been included in the receipts utilized as a measure for making the assessment under the Indiana Gross Income Tax Act of the taxes which are here sought to be recovered by the plaintiff.

(g) The defendants, further answering the complaint, admit that in general the outline of the method of business hereinabove described in this answer applies also to the parts manufactured by the plaintiff, and the defendant admits that a part of the tax sought to be recovered in this case was measured by the gross receipts received by the plaintiff from the sale of parts manufactured by it.

5 (a). The defendants admit so much of the paragraph of the plaintiff's complaint designated as "5(a)" as alleges that during the period from January 1, 1935, to December 31, 1937, the plaintiff received gross receipts from the sale of cars, trucks, and parts to dealers located within the State of Indiana where such payments or gross receipts and business was allocated by the plaintiff to its Chicago, Illinois, or Cincinnati, Ohio, or Louisville, Kentucky branches, upon which the additional tax with interest has been assessed as follows:

	1935	1936	1937	Total
Tax	\$26,656.81	\$19,901.31	\$15,173.18	\$59,731.30
Interest	10,854.72	5,591.95	2,336.13	18,782.80
				<u>\$78,514.10</u>

The defendants deny that the gross receipts which form the measure of the aforesaid tax were gross receipts derived from business or commerce conducted between states of the United States, and the defendants deny that such receipts were excepted by the terms and provisions of Section 6 (a) of the Gross Income Tax Act of 1933, and as amended in 1937, and hence that the plaintiff is entitled to any exemption thereby. The defendants further deny that the use of the gross receipts as aforesaid, which were derived from engaging in business in the State of Indiana and from a source within Indiana, is invalid and void by reason of the fact that the tax measured thereby constitutes a regulation of and a prohibited burden upon commerce between the states of the United States and, as such, is a violation of Section 8 of Article I of the Con-

stitution of the United States; and the defendants deny that the plaintiff is entitled to a refund of the tax assessed and collected by virtue of the business conducted within the State of Indiana by the plaintiff and by virtue of the gross income derived from sources within the State of Indiana measured by the gross income or gross receipts as aforesaid.

The defendants, further answering the plaintiff's complaint, deny that the gross receipts by which the aforesaid tax was measured were gross receipts derived from activities, businesses, and sources outside of the State of Indiana under the provisions of Section 2 of the Gross Income Tax Act of 1933, and as such Act was amended in 1937, and entitle plaintiff to exemption; the defendants further deny that the gross receipts used as a measure for the tax imposed upon the plaintiff by virtue of the business conducted within the State of Indiana and upon the basis of the gross income derived from sources within the State of Indiana, were received outside of the territorial boundaries of the State of Indiana; and the defendants further deny that the Gross Income Tax Act is invalid and void for the reason that the State of Indiana has no jurisdiction to impose a tax upon such gross receipts and that such a tax is lacking in due process of law and is in violation of Amendment 14 of the Constitution of the United States of America; and the defendants allege that the business done by the plaintiff within the State of Indiana and the source of the gross income utilized as a measure of the tax was within the taxing jurisdiction of the State of Indiana, and that the receipt of the gross income used as a
31 measure in determining the amount of tax was received within the State of Indiana, and the defendants further allege that the Gross Income Tax Act, and its application to the plaintiff during the period covered by this cause of action, is not invalid and is not void for the reason that the State of Indiana had no jurisdiction to impose the tax and that the tax was not in violation of the Fourteenth Amendment of the Constitution of the United States; and the defendants deny that the plaintiff is entitled to a refund of tax assessed and collected as above set forth.

(b) The defendants admit so much of the paragraph designated as "5(b)" of the plaintiff's complaint as alleges that during the period from January 1, 1936 to March 31, 1939, the plaintiff received as payment therefor gross

receipts from the sale of cars, trucks, and parts to dealers located in Indiana, which dealers had by the plaintiff been assigned to its Indianapolis, Indiana, warehouse and branch, where such cars, trucks, and parts were by the plaintiff delivered into the territory alleged by the plaintiff's complaint to have been allocated to the Indianapolis, Indiana, warehouse branch, directly to the dealers located in such territory allocated to the Indianapolis warehouse branch, from either Dearborn, Michigan, or Chicago, Illinois, or Cincinnati, Ohio, or Louisville, Kentucky, upon which additional tax with interest was assessed as follows:

	1936	1937	1938	1939 (1st Quarter)
Tax	\$2,079.62	\$21,349.98	\$7,371.15	\$4,442.80
Interest	256.22	1,397.98	294.85	66.64
			Total	
Tax				\$35,243.55
Interest				2,015.69
				\$37,259.24

32 The defendants deny that the gross receipts used as a measure by which the tax levied upon business conducted within the State of Indiana were gross receipts derived from commerce conducted between separate states of the United States, and that such receipts were excepted under the terms and provisions of Section 6 (a) of the Gross Income Tax Act of 1933, and as amended in 1937, and that the plaintiff was entitled to an exemption thereby; the defendants further deny that the tax imposed and collected, measured by the gross receipts derived from sources within the State of Indiana as aforesaid, were invalid and void assessments, or that the said Gross Income Tax Act was invalid and void for the reason that such tax constitutes a prohibited regulation of, and a prohibited burden upon, commerce between the states in the constitutional sense so as to be a violation of Section 8, Article I of the Constitution of the United States of America; and the defendants further deny that the plaintiff is entitled to a refund of the tax so assessed and collected upon gross income derived from sources within the State of Indiana, which gross income was directly derived from engaging in business within the State of Indiana.

(c) The defendants admit so much of the paragraph designated as "5(c)" of the plaintiff's complaint as alleges

that during the period from January 1, 1935, to December 31, 1937, the plaintiff received gross receipts from the sale of cars and trucks to dealers in the State of Indiana where the customers of such dealers or the plaintiff's dealers traveled to the plaintiff's place of business at either Dearborn, Michigan, or to the branches of the plaintiff at

Chicago, Illinois, or Cincinnati, Ohio, or Louisville, 33 Kentucky, and there accepted delivery of cars and trucks, and payment by such dealer was made at the time of such delivery at the plaintiff's branch or place of business in such other state; but the defendants deny that additional tax with interest was assessed upon such transactions measured by such gross income and that the refund thereof was denied by the Department of Treasury of the State of Indiana.

(d) The defendants admit so much of the paragraph designated as "5(d)" of the plaintiff's complaint as alleges that the plaintiff's gross income received by the plaintiff for January 1, 1935, to September 30, 1936, accrued and were reported and became taxable under the provisions of the Gross Income Tax Act of 1933 as the same existed prior to its amendment in 1937, which amendment became effective on April 1, 1937; but the defendants deny that the State of Indiana acting through the defendants was without right and authority under the provisions of the Gross Income Tax Act as amended, to assess any portion of the gross receipts of the plaintiff accruing during the aforesaid period with an additional tax, for the reason that the defendants did not at any time within two years after the time when the return covering such gross income was filed, give notice by registered mail to the plaintiff of such assessment; the defendants admit so much of the paragraph designated as "5(d)" as alleges that the notice of proposed assessment given by registered mail of the additional assessment against the plaintiff was given on January 7, 1939, which date was more than two years after the time when the annual returns covering the plaintiff's gross receipts from January 1 to December 31, 34 1935, and from January 1 to December 31, 1936, were actually filed, the defendants respectfully represent that such assessments were made as specifically authorized by the Indiana Gross Income Tax Act as amended, and that the assessments were properly made under and pursuant to the act in effect at the time that the assess-

ments were made by the Department of Treasury of the State of Indiana. The defendants deny that so much of the taxes assessed, measured by gross receipts derived by the plaintiff from sources within the State of Indiana during the period elapsed from January 1, 1935, to September 30, 1936, were or are invalid and void by virtue of any inhibition contained in the due process clause of the Fourteenth Amendment to the Constitution of the United States of America; and the defendants further deny that the plaintiff is entitled to a refund of the tax assessed and collected pursuant to the terms of the Gross Income Tax Act.

6. The defendants, as a further answer to the plaintiff's complaint, say that as to any allegation or averment, or any part thereof, contained in the said plaintiff's complaint not either admitted or denied heretofore in this Answer, the defendants now specifically deny each and every and all such allegations and averments, or parts thereof.

7. Wherefore, the defendants pray for judgment in their favor, for their costs, and for all other proper relief.

/s/ Omer Stokes Jackson,

Omer Stokes Jackson,

The Attorney General;

/s/ Joseph W. Hutchinson,

Joseph W. Hutchinson,

Deputy Attorney General,

/s/ Joseph P. McNamara,

Joseph P. McNamara,

Deputy Attorney General,

Attorneys for the Defendants.

219 Statehouse,
Indianapolis, Indiana.

35 And afterwards to wit at the November Term of said Court on the 12th day of December, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

This cause coming on for pre-trial conference and the parties being present by their respective attorneys, it is stipulated by the parties and it is ordered by the Court that this cause be continued until after decision in the following cases:

McGoldrick *vs.* Compagnie General Transatlantique Company, No. 44; and

McGoldrick *vs.* Felt & Tarrant Company, No. 45, now pending before the Supreme Court of the United States.

36 And afterwards to wit at the May Term of said Court on the 27th day of October, 1941, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Come now the parties by their respective attorneys, and the plaintiff files motion for leave to file amendment of and supplement to complaint, which motion is as follows: (H. I.)

And the Court being duly advised grants such leave, and the plaintiff files amendment of and supplement to complaint, which is as follows:

37 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—117) * *

AMENDMENT OF AND SUPPLEMENT TO COMPLAINT.

(Filed Oct. 27, 1941.)

I—Amendment to Complaint.

Comes now the plaintiff, Ford Motor Company, and by way of amendment to its original complaint, and for a further and additional allegation in paragraph 4(c), on page

5, line 16, and immediately following the words "the cars and trucks.", and before the sentence beginning "The branch upon receipt of the remittances . . .", makes the following additional allegation:

"In many instances, the cars and trucks are partially or totally financed by the dealers with finance companies. In some instances, papers transferring title to the cars and trucks for the purpose of securing the loans of the finance companies are executed at the gate of the plaintiff's plants or branches at Chicago, Illinois, Cincinnati, Ohio, Louisville, Kentucky and Dearborn, Michigan by representatives of the truck-away-companies who have been given authority by such dealers to execute such finance and title papers. In some instances remittance is made directly by the finance companies for all or part of the purchase price so financed, such payment being made from the finance company's offices outside of the State of Indiana to the
38 branches of the plaintiff at Chicago, Illinois, Cincinnati, Ohio, Louisville, Kentucky and Dearborn, Michigan. The plaintiff looks to the truck-away-companies for all remittances, and said Companies are responsible for all collections and damage to or loss of cars or trucks in transit."

II—Supplemental Complaint.

Comes now the plaintiff, Ford Motor Company, and by way of supplement to its original complaint, and for a second, further and additional Paragraph of complaint alleges that:

Second Paragraph.

Comes now the plaintiff and complains of the defendant, and for a Second and further Paragraph of complaint alleges that:

1. Jurisdiction is founded upon diversity of citizenship and amount. Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Dearborn in the State of Michigan. Defendant, Department of Treasury of the State of Indiana, is an executive Department of the State of Indiana vested with the enforcement and application, through an administration division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act

of 1933 (Chapter 50, Acts of 1933), as amended by the Acts of 1937 (Chapter 117, Acts of 1937). Defendants, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, were at the time of filing of the original complaint each citizens and residents of the State of Indiana and of the County of Marion, and together constituted the Board of Department of Treasury of the State of Indiana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

2. At the proper time required by law, plaintiff had filed returns with the defendant, Department of Treasury, for the years 1935, 1936 and 1937 and paid all of the tax 39 for each such year as it in good faith deemed to be due on its gross receipts under the Indiana Gross Income Tax Act.

3. On the 17th day of January, 1939, plaintiff paid to the defendant, Department of Treasury, Eighty-one Thousand Fifty-eight Dollars and Five Cents (\$81,058.05), which payment was made for additional tax and interest assessed against the plaintiff for the years 1935, 1936 and 1937. The aforesaid tax and interest paid by the plaintiff was based upon a notice of proposed assessment dated July 1, 1938 issued by the defendant, Department of Treasury, and supported by an audit which was attached as a part of the proposed assessment, and which set forth in detail the basis of the proposed additional tax. The major portion of said tax and interest was assessed on account of sales by plaintiff from its branches outside of the State of Indiana to dealers located in Indiana. The portion so assessed as shown by said audit so attached was:

	1935	1936	1937	Total
Tax	\$26,656.81	\$19,901.31	\$13,173.18	\$59,731.30
Interest	10,854.72	5,591.95	2,336.13	18,782.80
				<hr/> \$78,514.10

Concurrently with the payment of the tax, and on January 17, 1939, plaintiff filed a petition for correction of amount of tax and refund of excess tax for the years 1935, 1936 and 1937, claiming a refund of all of the tax and interest assessed and paid on January 17, 1939 as above alleged. On March 22, 1939, the defendant, Department of Treasury, denied said claim for refund in all particulars, including the amount claimed as refund on receipts derived from sales

of plaintiff's branches located outside of the State of Indiana, on sales from said branches to dealers located in the State of Indiana.

391 4. On June 8, 1939, plaintiff filed in this Court its first paragraph of complaint for refund of so much of the additional tax paid, as above alleged, as was levied upon receipts from sales from taxpayer's branches located outside of Indiana to dealers within the State of Indiana. Thereafter, the defendants filed an answer to said complaint, admitting among other things the correctness of the amounts claimed as refund on the sales above described (as alleged in paragraph 5(a) of plaintiff's complaint and admitted in paragraph 5(a) of defendant's answer). Said cause was assigned for trial for December 23, 1940, and a pre-trial conference on November 26, 1940. Prior to said pre-trial conference, the Attorneys for the defendant indicated to the Attorneys for the plaintiff that they felt the case should be reconsidered by defendant, Department of Treasury, on its merits, and on November 25, 1940, plaintiff requested the defendant, Department of Treasury, to reconsider the ruling of the Department on a petition for refund. The Department did reconsider the ruling on petition for refund so far as the same related to the sales of the character above described, which sales represented receipts on which additional tax was paid as alleged in paragraph 5(a) of the complaint and admitted in paragraph 5(a) of defendants' answer as follows:

	1935	1936	1937	Total
Tax	\$26,656.81	\$19,901.31	\$13,173.18	\$59,731.30
Interest	10,854.72	5,591.95	2,336.13	18,782.80
				<u>\$78,514.10</u>

The defendant, Department of Treasury, sent its Attorneys to Louisville, Kentucky, one of the branches of the plaintiff, and to Dearborn, Michigan, the home office of the plaintiff, and there interviewed officials and employees of plaintiff, examined records and documents, and also reviewed files and other information. On March 1, 1941, the defendant, Department of Treasury, acquiesced in the plaintiff's petition for reconsideration of its ruling so far as the tax and interest above set forth were concerned, and upon said reconsideration agreed with the plaintiff that the receipts from the transactions above described were not taxable under the Indiana Gross Income

Tax Act, and that it would take the necessary steps to refund the tax paid on such receipts, and referred the matter to the refund section of the defendant for completion of the refund of the tax to the plaintiff. On or about March 1, 1941, the defendant notified plaintiff that said claim for refund had been allowed. Plaintiff acquiesced in such allowance and ruling, and concurred in and agreed to the refund to it of the amount set forth in this paragraph and referred to in its petitions for refund and in the ruling of the defendant of March 1, 1941 above referred to.

5. No part of the aforesaid tax and interest so paid by the plaintiff has been refunded to the plaintiff by the defendant. By reason of the premises herein alleged, an account was stated between the parties, and the defendant, Department of Treasury, is indebted to the plaintiff in the amount of Seventy-eight Thousand Five Hundred Fourteen Dollars and Ten Cents (\$78,514.10), together with interest thereon, all of which is wholly due and unpaid.

Wherefore petitioner prays judgment upon the facts and law against the defendant, Department of Treasury, in the above sum, with interest, and for all further proper relief in the premises.

/s/ James A. Ross,

/s/ Harry T. Ice,

*Attorneys for Plaintiff, Ford Motor
Company.*

Matson, Ross, McCord & Ice,
Of Counsel.

Receipt of copy of the foregoing acknowledged this 24th day of October, 1941.

/s/ Joseph P. McNamara,
Attorney for Defendants.

41 (Entry for October 27, 1941, continued.)

And the defendants file answer to the amendment of and supplement to the complaint, which answer is as follows:

42 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—117) * *

ANSWER TO AMENDMENT OF AND
SUPPLEMENT TO COMPLAINT.

(Filed Oct. 27, 1941.)

I—Answer to Amendment.

Come now the defendants and by way of answer to the plaintiff's amendment to its original complaint, and by way of answer to the further and additional allegations placed in paragraph 4(c) on page 5, beginning at line 16, the defendants make the following answer to the additional allegations:

The defendants admit so much of the additional allegation as alleges that "in many instances, the cars and trucks are partially or totally financed by the dealers with finance companies;" the defendants further admit so much of the paragraph as alleges that "in some instances papers * * * for the purpose of securing the loans of the finance companies are executed at the gate of the plaintiff's plants or branches at * * * Louisville, Kentucky * * * by representatives of the truck-away-companies who have been given authority by such dealers to execute such finance * * * papers," but the defendants deny that in any

43 instance the title to the cars and trucks is transferred at the gate of the plaintiff's plants or branches, and the defendants further deny that papers transferring title to the cars and trucks are executed at the gate of the plaintiff's plants or branches at Chicago, Illinois, Cincinnati, Ohio, Louisville, Kentucky, and Dearborn, Michigan, and the defendants further deny that the representatives of the truck-away-companies have been given authority by the dealers to execute any title papers. The defendants for a further answer allege that the finance papers that are executed at the gate of the plaintiff's plant or branch at Louisville, Kentucky, are not dated as of the date that

such papers are executed, but are dated with the date upon which the truck-away-company finally delivers the cars or trucks to the dealer's establishment located within the State of Indiana. Further, the defendants allege that during the taxing periods in question in this cause of action, cars and trucks which had been financed at Louisville, Kentucky, were in some instances refused by the dealers upon the arrival of such cars or trucks at the dealer's place of business located within the State of Indiana, and that in such instances the plaintiff, Ford Motor Company, delivered such cars or trucks to another Ford dealer within the State of Indiana, or caused delivery of such cars or trucks to be made to the plaintiff's Indianapolis, Indiana branch. In such instances the title to said cars or trucks refused by the first Ford agent would later be taken by another Ford agent, or taken to the plaintiff's Indianapolis, Indiana branch and from that point delivered to another Ford agent, and would show a transfer of title direct from the manufacturer, i. e., the plaintiff, Ford Motor Company, to the Ford agent to whom the goods were finally sold and delivered, and did not indicate any transfer of title whatsoever to the Ford agent upon whose behalf so-called finance papers had been allegedly made out at the plaintiff's

44 Louisville, Kentucky, branch.

Further answering the paragraph of amendment, defendants admit that "in some instances remittance is made directly by the finance company for all or part of the purchase price so financed, such payment being made from the finance company's offices outside of the State of Indiana to the branches of the plaintiff at Chicago, Illinois, Cincinnati, Ohio, Louisville, Kentucky, and Dearborn, Michigan," but the defendants deny that the remittances were made in the manner described immediately above in each and every instance or in all instances, and the defendants respectfully represent to the Court that the plaintiff, Ford Motor Company, has never revealed to the defendants the aggregate amounts in which remittances were made by the finance companies from points outside the State of Indiana and from points inside the State of Indiana. The defendants deny the allegation that "the plaintiff looks to the truck-away-companies for all remittances and said companies are responsible for all collections and damage to or loss of cars or trucks in transit."

The defendants for further answer to the plaintiff's

"I—Amendment to Complaint," assert that as to any statement or allegation or part thereof therein contained not heretofore specifically admitted or denied in the foregoing "I—Answer to Amendment," that the defendants now deny any such statement or allegation or averment, or part thereof.

45 II—Answer to Supplemental Complaint.

Come now the defendants and each of them, and by way of answer to the supplement of the plaintiff's original complaint, and for a second further and additional paragraph of answer, allege that:

Second Paragraph.

Come now the defendants and for answer to the second and further paragraph of complaint, state that:

1. The defendants admit that jurisdiction is founded upon diversity of citizenship and an allegation of the amount involved. Defendants admit that the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business at Dearborn in the State of Michigan. The defendants admit that the defendant Department of Treasury of the State of Indiana is an executive department of the State of Indiana, vested with the enforcement and application of the Indiana Gross Income Tax Act of 1933 (Chapter 50 of the Indiana Acts of 1933) and that Act as amended by the Acts of 1937 (Chapter 117 of the Indiana Acts of 1937). The defendants further admit that M. Clifford Townsend, at the time of the filing of the original complaint was the Governor of the State of Indiana; that Joseph M. Robertson, at the time of the filing of the original complaint, was the Treasurer of the State of Indiana; and that Frank G. Thompson, at the time of the filing of the original complaint, was the Auditor of the State of Indiana, and that each of the foregoing were at the time of the filing of the original complaint citizens and residents of the State of Indiana and of the County of Marion, and that at the time of the filing of the original complaint they together constituted the Board of Department of Treasury of the State of Indiana. The defendants

admit that the amount of controversy exceeds, exclusive of interest and costs, the sum of \$3,063.00.

2. The defendants admit that the plaintiff filed returns with the defendant Department of Treasury for the annual taxing periods of 1935, 1936, and 1937, and paid to the Department of Treasury the tax for each of said annual taxing periods as was computed by the amounts reflected on such returns prepared by the plaintiff, and the defendants admit that these returns for the annual taxing periods of 1935, 1936, and 1937, prepared by the plaintiff, were filed with the Department of Treasury by the plaintiff at the proper time, as required by the statutes of the State of Indiana; but the defendants state that as to the allegation of plaintiff that the plaintiff "paid all of the tax for each year as it in good faith deemed to be due," that the defendants have not sufficient information either to admit or deny the allegation with respect to good faith.

3. The defendants admit that on the 17th day of January, 1939, plaintiff paid to the defendant Department of Treasury \$81,058.05, which payment represented additional taxes and interest assessed against the plaintiff for the annual taxing periods of 1935, 1936, and 1937. Defendants admit that the aforesaid tax and interest paid by the plaintiff was based upon a Notice of Proposed Assessment dated July 1, 1938, issued by the defendant Department of Treasury, and supported by an audit which was attached as a part of the proposed assessment, and which set forth in detail the basis of the proposed assessment. The defendants allege that the amounts reflected in the proposed assessment were assessed against the plaintiff and that all of the statutory provisions with reference to the making of an assessment were strictly adhered to. In answer to the allegation that "the major portion of said tax and interest was assessed on account of sales by plaintiff from its branches outside the State of Indiana to dealers located in Indiana," the defendants deny that the major portion, or any great portion of the said tax and interest was
47 assessed on account of any sale by plaintiff at a branch outside of the State of Indiana. But the defendants admit that the major portion of said tax and interest so assessed was measured by the gross receipts of the plaintiff derived from sales made within the State of Indiana where the delivery of the thing sold was made within Indiana but in instances where the plaintiff elected to bring

the car or trucks sold from one of its branches located outside of the State of Indiana. The defendants, further answering the paragraph of complaint, state that the defendants do not have sufficient information either to affirm or deny the allegations of amounts contained in the third, fourth, fifth and sixth lines of the paragraph numbered "3" appearing at the top of page 3 of the second paragraph of plaintiff's supplemental complaint. The defendants, further answering paragraph "3" of the second paragraph of the supplemental complaint, admit that concurrently with the payment of the tax, and on or about January 17, 1939, the plaintiff filed a petition for the correction of the amount of tax and a refund of excess tax for the taxes paid for the annual taxing periods of 1935, 1936, and 1937, and in such petition claimed a refund of all of the tax and interest assessed against it and paid on January 17, 1939. The defendants further admit that on or about March 22, 1939, the defendant Department of Treasury denied the said claim for refund in all particulars.

4. The defendants, for answer to the paragraph designated as "4" of the second paragraph of the supplemental complaint admit that on June 8, 1939, the plaintiff filed in this Court its first paragraph of complaint for refund, but the defendants deny that the taxes sought as a refund were either levied upon receipts or measured by receipts from sales from the taxpayer's branches located outside the State of Indiana to dealers within the State of Indiana, and defendants allege that the taxes were measured by the gross receipts of the plaintiff derived from Indiana sales to Indiana dealers where the plaintiff transferred title to the purchaser within the State of Indiana, and in many instances received remittance therefor within the State of Indiana. The defendants admit that the defendants thereafter filed answer to the said complaint and that said cause was assigned for trial on December 23, 1940, and that a pre-trial conference was held on November 26, 1940. The defendants admit that prior to the said pre-trial conference the attorneys for the defendants indicated to the attorney for the plaintiff that they felt that the cause could be reconsidered by the defendant Department of Treasury and the defendants admit that on December 25, 1940, the plaintiff requested the defendant Department of Treasury to reconsider the ruling of the Department with reference to the plaintiff's petition for refund. The de-

defendants further admit that the defendant Department of Treasury did reconsider the ruling on the petition for refund. The defendants further admit that the defendant Department of Treasury caused its Chief Hearing Judge and the Deputy Attorney General assigned to said Department of Treasury to go to Louisville, Kentucky, one of the branches of the plaintiff, and to Dearborn, Michigan, the home office of the plaintiff, and that the Chief Hearing Judge and the Deputy Attorney General there interviewed officers and employees of the plaintiff, examined such records and documents as were presented for examination by the plaintiff, and also reviewed such files and received such other information as was presented by the agents of the plaintiff. The defendants allege that on each such instance plaintiff was represented by Mr. Harry T. Ice, its attorney, who presented such information and data and called such officers and employees of the plaintiff to give information as he deemed to the best interests of the plaintiff. The defendants admit that thereafter, and on March 1, 1941, the defendant Department of Treasury acquiesced in 49 the plaintiff's petition for reconsideration of its ruling, and issued a second letter of finding, dated March 1, 1941, which read as follows:

"March 1, 1941

"Ford Motor Car Company.
Dearborn, Michigan

Gentlemen:

*Account No. 49-19204

"Reference is being made to the application of the Ford Motor Car Company for refund of certain amounts of gross income tax paid for the annual calendar periods of 1935, 1936 and 1937. This application for refund was filed on January 17, 1939, and after giving the application careful consideration the application was denied under date of March 2, 1939.

"On November 25, 1940, the taxpayer corporation, through its attorney, submitted a petition for a reconsideration of the Department's denial of its claim for refund and requested a rehearing in the matter. The request for a reconsideration and a rehearing was based upon the contention of the taxpayer corporation that the transaction concerning the sale of products manufactured or assembled by this taxpayer corporation at points outside of the State

of Indiana, and there delivered to Indiana customers within the territorial limits of that outside branch or assembly plant constituted a transaction completed in its entirety outside of the State of Indiana, and thus did not fall within the purview of the Gross Income Tax Act.

"The Department acquiesced to the taxpayer corporation's petition, and conferences concerning this matter were held with the officials of the taxpayer corporation's assembly plant at Louisville, Kentucky, on December 20, 1940, and with the executive staff of the taxpayer corporation's main office at Dearborn, Michigan, on January 7, 1941.

"At these conferences evidence was presented to show that the Ford Motor Car Company accepts orders for its products from Indiana customers. These Indiana customers are for the most part retail automobile dealers. The Ford Motor Car Company will make delivery of such automobiles to the Indiana customers or to their authorized agents at the delivery gate of its out-of-state manufacturing plant or assembly plant. Deliveries of the products desired by Indiana customers are made under conditions whereby the Ford Motor Car Company, at the time of the delivery to the customers or the customers' authorized representatives, will be paid for the products, or appropriate financing will be arranged for by the customers or by their authorized agents.

"It is further disclosed that the Ford Motor Car Company in regard to sales made to Indiana customers resident within the territorial jurisdiction of the outside manufacturing and assembling plants does not have the obligation or the responsibility, under the terms of the sale, to make delivery of the products desired by Indiana customers to those customers across State lines, nor does any obligation or responsibility to initiate such transportation across

State lines exist. It is indicated that the entire responsibility of the Ford Motor Car Company to the customer ceases at the time of delivery of the products to the Indiana customers or to their authorized representatives at the delivery gate of the manufacturing or assembling plant outside of the State of Indiana.

"It is, therefore, indicated that such a transaction is completed at a business situs entirely outside of the State of Indiana, and that such a transaction is not a transaction made in interstate commerce, and that the question of facilities is not existent in this transaction.

"The Department will accordingly take the necessary steps to make refund of the gross income tax paid on the transaction outlined above. This file will be remanded to the Refund Section of this Department for further handling."

The defendants further answering paragraph "4" admit that on or about March 1, 1941, the defendants mailed the letter of findings reproduced above to the plaintiff.

The defendants for further answer to the plaintiff's paragraph "4" of the supplemental complaint state that as to any allegation or averment or part thereof contained in the said literary paragraph "4" not either specifically admitted or denied in the foregoing paragraph "4", that the defendants now deny each such averment or allegation or part thereof.

5. The defendants, for answer to the paragraph designated as "5" of the second paragraph of the supplemental complaint (to be found at the bottom of page 4 of the supplemental complaint), admit that no part of the aforesaid tax and interest so paid by the plaintiff has been refunded to the plaintiff by the defendants. The defendants deny the allegation that "by reason of of the premises herein alleged, an account was stated between the parties, and the defendant, Department of Treasury, is indebted to the plaintiff in the amount of Seventy-eight Thousand Five Hundred Fourteen Dollars and Ten Cents (\$78,514.10), together with interest thereon, all of which is wholly due and unpaid." The defendants, for further answer to the paragraph designated as "5" of the second paragraph of the supplemental complaint, allege that the plaintiff has

51 never submitted to the defendant Department of Treasury any computation showing the volume of the gross income that it derived from sales transactions completed at the plaintiff's business sitii located entirely outside the State of Indiana, nor has the plaintiff segregated such transactions on its books and records; nor has the plaintiff by petition for refund or otherwise ever indicated the amount of tax which it alleges should be refunded as the result of gross income received from transactions completed at a business situs entirely outside of the State of Indiana; and the defendants for further answer to the paragraph designated as "5" allege that the defendants, at great inconvenience and cost to the defendant Department of Treasury, have audited the books, records, invoices, and other information of the plaintiff in an effort to ascertain whether or not any gross receipts derived from a

transaction completed at a business situs entirely outside the State of Indiana was because of the information first revealed by the plaintiff inadvertently utilized as the measure of the additional taxes assessed against the plaintiff for the years 1935, 1936, and 1937; that the defendant Department of Treasury has completed such audit and that the five auditors so assigned to said audit are presently engaged in preparing their audit reports with reference to this matter; that the preparation of this audit report is complicated by the fact that the records of the plaintiff, Ford Motor Company, were scattered in five states and that with reference to the furnishing of cars from one branch, i. e., the Louisville branch, during the annual taxing period of 1937 there were eight hundred seventy-four cars which were either refused by the dealer or the details of the transaction changed before the completion of the delivery to the dealer, and by the fact that the plaintiff had not coordinated its bookkeeping record to present aggregates of such refusals or changes; that upon the completion of the preparation of the audit report, the defendant Department of Treasury intends to make a refund to the plaintiff in the full amount shown by such report to have been assessed by virtue of receipts derived from transactions completed at a business situs entirely outside the State of Indiana, if such receipts were originally used in the measure of the tax assessed against the plaintiff.

6. The defendants state that as to any allegation or averment or statement, or part thereof, contained at any place in the second paragraph of supplemental complaint filed herein by the plaintiff, which has not either been specifically admitted or denied heretofore in this answer, that the defendants now deny each and every such allegation, averment, statement, or part thereof.

Wherefore, the defendants pray for judgment upon the facts and law against the plaintiff, Ford Motor Company, and that the Ford Motor Company take nothing by this suit, and for all other proper relief in the premises.

/s/ George N. Beamer,
George N. Beamer,
The Attorney General,
/s/ Joseph W. Hutchinson,
Joseph W. Hutchinson,
Deputy Attorney General,
/s/ Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General,
Attorneys for Defendants.

Receipt of a copy of the foregoing "Answer to Amendment of and Supplement to Complaint" is acknowledged this 27th day of October, 1941.

/s/ **Harry T. Lee,**
Attorney for Plaintiff.

53 And afterwards to wit at the November Term of said Court on the 9th day of March, 1942, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

It is ordered by the Court that the above entitled cause be and the same is hereby referred to Albert Ward as Special Master, to take the evidence and report the same, together with his findings of fact and conclusions of law, to this Court with all convenient speed.

54 And afterwards to wit at the November Term of said Court on the 10th day of February, 1943, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

This cause coming on now to be finally heard by the Court and the parties appearing by their respective attorneys, and the Court having heard the evidence and the arguments of counsel and being sufficiently advised in the premises, overrules each and every objection of plaintiff to the report of the Special Master herein and now, pursuant to Rule 52 of the Rules of Civil Procedure, signs and files herein its Special Findings of Fact and states its Conclusions of Law thereon, which said Special Findings of Fact and Conclusions of Law are ordered by the Court filed and made a part of the record in this cause, all of which is now done.

55 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—117) • •

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed Feb. 10, 1943.)

Pursuant to Rule 52 of the Rules of Civil Procedure the Court now makes its Findings of Fact and Conclusions of Law:

56 **Findings of Fact.**

Finding No. One.

(a) Plaintiff, Ford Motor Company (hereinafter sometimes referred to as either "plaintiff" or "Company") when this action was commenced, was, and is now a corporation organized under the laws, and was then and is now a citizen of the State of Delaware.

(b) Defendant, Department of Treasury of the State of Indiana, is an Executive Department of said State, vested with the enforcement and application, through an administrative division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act of 1933 (Ch. 50, Acts 1933), as amended by Acts of 1937 (Ch. 117, Indiana Acts of 1937). When this action was commenced, Defendants, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, were, and they now are each citizens of the State of Indiana, and at the time of filing the complaint herein together constituted the Board of Department of Treasury of said State. All defendants are hereinafter sometimes referred to as either "defendant" or "Department".

(c) Gilbert K. Hewit is the Director of the Gross Income Tax Division of the Department of Treasury, and has been the Director of that Division continuously since November, 1939. As such, he is vested with the authority to administer the provisions of the Indiana Gross Income Tax Act of 1933 as amended.

(d) Elmer F. Marchino is the Hearing Judge of the Gross Income Tax Division of the Department of Treasury, and has been such continuously since May, 1933. As such, he hears and determines objections to proposed additional assessments of Gross Income Tax and petitions
57 for the refund of Gross Income Tax. He has the power and authority to determine the facts involved on any

notice of proposed assessment of additional tax or petition for refund of tax, and the right to determine, from a legal status, the policy of the Department.

(e) Joseph P. McNamara is a Deputy Attorney-General of the State of Indiana and is one of the deputies assigned by the Attorney-General to the Gross Income Tax Division, Department of Treasury. As such, in addition to other duties assigned by the Attorney-General, he defends the department in suits for refund of taxes and other legal matters in which said department may be or become involved. He advises the department in connection with such litigation and represents it in court. He has occupied such position continuously since May, 1933.

Finding No. Two.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

Finding No. Three.

Throughout the Finding all facts relate to the period from January 1, 1935 to March 31, 1939, unless it is otherwise specifically stated.

58 Finding No. Four.

(a) Plaintiff is engaged in the business of manufacturing and selling automobiles, trucks and parts. Its principal manufacturing establishment (the River Rouge plant), its home office and principal place of business, all are located at Dearborn in the State of Michigan. The establishment at Dearborn is a plant for manufacturing the parts of its products, also a plant for their assembly into finished cars and trucks and a branch with limited distributing territory, none of which extends into Indiana. Plaintiff has no factory or assembly plant within the State of Indiana in which its products are manufactured or assembled, but all of the products distributed in Indiana are either manufactured and assembled at Dearborn, Michigan, or assembled at Chicago, Illinois, Cincinnati, Ohio and Louisville, Kentucky. At Indianapolis, within the State of Indiana plaintiff maintains a branch for storage and for distribution of its cars, trucks and parts. Chicago, Louisville and Cincinnati are also branches of plaintiff, for the assembly of cars and trucks, and for distribution of its cars, trucks and parts. Occasionally at the Chicago,

Louisville and Cincinnati branches some cars may be on hand and lined up in the open on property adjacent to the plant. Generally these cars are awaiting the addition of some part or correction of some defect apparent from checking at the end of the assembly line, but also occasionally they are cars held where there is no immediate order from a dealer. No buildings are maintained at such branches for storing cars and trucks.

59 Finding No. Five.

All of the products of plaintiff in the transactions involved here, are sold to the ultimate consumers by independent dealers who have contracted with the plaintiff, which contracts were executed subject to the approval of the plaintiff's Dearborn office. The dealers, residents of the State of Indiana, execute with plaintiff an instrument in writing designated "Sales Agreement". Such agreement is in the following form:

"Louisville Branch"

"Ford Motor Company

Sales Agreement

Agreement made at Dearborn, State of Michigan, as of this 13th day of May, 1935, by and between Ford Motor Company, a Delaware corporation with its principal place of business at Dearborn, Michigan (hereinafter called "Company"), and Jackson Motor Sales, Inc., a corporation of the State of Indiana with principal place of business at Crothersville, Jackson County, State of Indiana (hereinafter called "Dealer").

In consideration of the promises herein made to each other by the parties hereto it is agreed as follows:

Selling Rights

(1) Company agrees to sell and Dealer agrees to purchase, for resale for use within the boundaries of the United States of America, Ford automobiles, trucks, Chassis, automobile bodies, pick-up bodies, truck bodies, cabs, accessories and parts (hereinafter sometimes collectively referred to as Company's "Products") upon the terms, conditions and provisions hereinafter specifically set forth and subject to the right reserved by Company to sell to other Dealers and direct to retail purchasers in any part

of the United States without obligation for any commission to Dealer on any such sale.

Prices, and Terms

(2) Company will sell its products to Dealer f. o. b. Detroit, Michigan, at such net list price, or at such discounts from published list prices as are from time to time filed by Company. Payment by Dealer is to be in cash before delivery, or by paying sight draft attached to bill of lading, including exchange. Receipt from Dealer or Dealer's bank of any check, draft or other paper shall not be held to constitute payment, and if Company is unable to obtain U. S. currency on any such check, draft or other paper for any reason whatever within 30 days after receipt of same, Dealer shall reimburse Company, upon request, in full, including any expenses sustained by Company in endeavoring to realize on such paper.

60 Freight and Packing

(3) In addition to the payments hereinbefore specified, Dealer shall pay Company such amount as Company shall from time to time determine for freight, crating, boxing, packing, double-decking, loading, delivering, and other handling expense. On rail or boat shipments, Dealer shall be credited against the amount so fixed, in a sum equal to any freight actually paid by Dealer.

Taxes

(4) In addition to the specified purchase price, Dealer shall pay a sum equivalent to any tax imposed by any law of the United States or of any of the States upon the manufacture or sale of any article sold under this agreement. Dealer shall also pay any excise or other taxes or fees which may be imposed on Company's products, or on account of such business, or on Dealer's stock, or Company's products in transit, to Dealer, or on the transportation, advertisement or sale thereof.

Change in Prices

(5) "List Prices" of all Ford products shall be subject to change at any time and from time to time without obligation on Company to adjust with Dealer as to price of any product shipped, or paid for but not in transit, at the time such price change becomes effective.

Title

(6) Title to all Company products until actually paid for by Dealer shall be and remain in Company; but regardless of title remaining in Company or having passed to Dealer all shipments shall be at Dealer's risk from the time of delivery to carrier at place of shipment.

(7) Dealer agrees specifically as follows:

Place of Business—Representation

(a) To maintain a place of business (and only one place of business unless service station is separate from sales room) suitably located and equipped as sales room and service station and acceptable to Company; to conspicuously display effective signs; to carry an adequate stock of genuine Fords parts; to install and maintain tools and machinery in said service station as recommended by Company; to employ competent salesmen; and to make repairs in a workmanlike manner on products of Company whether sold by Dealer or not. Company shall not be responsible for any expenditures made or incurred by Dealer in preparation for the performance, or in the performance of this agreement.

U. S. Government Business

(b) To turn over if and when requested by Company inquiries or orders received from the United States Government or any department thereof or from the American Red Cross, without payment of any commission, remuneration, or charge for handling.

61 Demonstrators

(c) To purchase, and at all times maintain in good running condition and clean order, for demonstration or exhibition only, at least one Ford automobile and at least one truck of the current year's production.

Retail Buyer's Order and Deposit

(d) To obtain from each purchaser of a Ford automobile, truck, cab or chassis, a written order, on Company's form, signed in duplicate by the purchaser, and a cash deposit of not less than \$25.00 on each automobile, truck, cab or chassis, and to furnish Company, upon its request, with one signed copy of order.

Orders on Hand at time of Termination

(e) To turn over to Company, or its nominee, on termination of this agreement, all unfilled retail orders, and deposits made thereon, and names and addresses of owners and prospective purchasers; it being intended that this clause shall operate immediately upon termination of this agreement as an assignment of Dealer's rights and interest in and to said orders and deposits.

Repair Parts

(f) Not to recommend parts other than those furnished by Company unless previously approved by Company, nor to substitute parts other than those furnished by Company if Company's parts are requested, nor to sell parts other than those furnished by Company unless specifically requested by purchaser.

Advertising

(g) Not to advertise or deal in Company's products in a manner detrimental to it or to any of its dealers, nor to publish or in any manner use advertising matter or to continue sales policies to which Company may object as detrimental to its good will. On termination of this agreement Dealer agrees to immediately remove, at Dealer's expense, all Ford signs from Dealer's place of business and to discontinue all Ford advertising.

Trade-Mark

(h) Not to use the words "Ford," "Fordson" or "Lincoln," or coined words or combinations containing the same, or any other trade-mark or trade name adopted by Company, as a part of Dealer's firm name or trade name.

Patents

(i) Not to contest the validity of any patent, right or trade-mark used or claimed by Company, nor to contest the right of Company to exclusive use of any trade-mark or trade name at any time adopted by Company.

Ten Day Reports

(8) Recognizing that the receipt of information called for on Dealer's Ten-Day Report is of Vital Importance to the production and distribution of Ford products, Dealer specifically agrees to see that his report is prepared ac-

curately and forwarded to the branch promptly on dates specified therein.

(9) It is further mutually agreed that:

Orders

4(a) Dealer will furnish Company, if requested, prior to the tenth of each month, an order for the number of Ford automobiles, trucks, cabs and chassis that Dealer will purchase from Company during the succeeding month.

62 Company agrees to give careful consideration to such orders, but expressly reserves the right to follow or depart from such orders according to its discretion. Company shall in no way be liable for any delay in shipments, however caused, nor for shipments over other than specified route.

Limit of Authority Warranty

(b) Dealer has no authority to make any representation concerning, or on behalf of, Company nor to make any warranty concerning its products, but shall refer purchasers to "Manufacturer's Warranty" printed on the back of Retail Buyer's order. Dealer shall not in any manner assume or create obligations on behalf of Company, nor in any manner act as its agent. Dealer shall at all times permit Company's representatives to have access to Dealer's place of business to ascertain the adherence of Dealer to the above and to all other provisions of this agreement.

Termination

(c) This agreement may be terminated at any time at the will of either party by written notice to the other party given either by registered mail or by personal delivery, and such termination shall also operate to cancel all orders theretofore received by Company and not delivered.

Products on Hand at Time of Termination

(d) Upon termination of this agreement Company may, at its option, repurchase from Dealer all or any part of Company's products in Dealer's possession, and Dealer agrees to sell such products to Company at the price paid therefor plus freight but less any liens or encumbrances thereon. And Dealer hereby grants Company the right to enter the premises of Dealer upon termination of this agreement and to take possession of all or any part of said prod-

ucts upon tender of the purchase-price thereof, determined as above.

Law of Agreement

(e) This is a Michigan Agreement and shall be construed according to the laws of the State of Michigan. If any provision of this agreement is held to be invalid or unenforceable, this contract shall, as to such provision, be considered divisible and the balance of the agreement shall be valid and binding.

Assignment

(f) This agreement may not be assigned by Dealer without written consent of Company.

Prior Agreements

(g) If prior to the date hereof a sales agreement shall have been in effect between the parties hereto, Company and Dealer agree, each in consideration of release by the other from the obligations and rights thereunder existing, that such prior sales agreement is hereby terminated and cancelled, and after the date hereof all the rights and obligations of the parties hereto shall be governed and controlled exclusively by this agreement.

Amendments

(h) The terms of this agreement may not be enlarged, varied, modified or cancelled by any agent or representative of Company, except by an instrument in writing executed by the President, Vice-President, Secretary, or 65 Assistant Secretary of Company, and Company will not be bound by any alleged enlargement, variation, modifications, or agreement not so evidenced.

No Understanding Not Contained Herein

(10) As a condition precedent to Company entering into this agreement, Dealer represents and warrants that he has carefully read over each and every part of this agreement, and understands each and every term thereof; and further represents and warrants that no representations or statements have been made to him by the Company, or its officers, agents, employees or representatives, which would in any way tend to add to, modify or change the terms, or any one or more of them, of this agreement.

(11) This agreement shall not bind Company until it is signed by either its President, Vice President, Secretary or Assistant Secretary.

In Witness Whereof the parties have executed this agreement as of the day and year first above written.
Jackson Motor Sales, Inc.

(Dealer's Trade Name)

Ford Motor Company,

By: E. W. Franz,
Secy. & Treas.

By: (Signed) A. G. Coulton,
Assistant Secretary."

(Signature and Title)

64 Finding No. Six.

All dealers are proctured by the branch of the plaintiff which has jurisdiction of the territory in which the prospective dealer is located; the dealer receives his training from, places his orders with, makes his payments to, and directs correspondence to the branch that has the territory in which he is located. The agreements with dealers always specify the branch of the plaintiff to which the dealer is assigned by the plaintiff.

Finding No. Seven.

All of the dealers of the plaintiff in the State of Indiana are assigned to plaintiff's branches at either Indianapolis, Indiana, Chicago, Illinois, Cincinnati, Ohio or Louisville, Kentucky on the basis of territorial boundaries set up by plaintiff for each of the branches. The Louisville branch has assigned to it, in addition to its territory in Kentucky and part of Tennessee, the Counties of Warrick, Spencer, Dubois, Perry, Crawford, Orange, Jackson, Washington, Harrison, Floyd, Clarke and Scott, which are Counties within Indiana lying north of the Ohio River and geographically close to Louisville. The Cincinnati branch has, in addition to its territory in part of Ohio and part of Kentucky, the Counties of Switzerland, Ohio, Ripley, Dearborn and Franklin, which are Counties within Indiana lying north of the Ohio River and geographically close to Cincinnati. The Chicago Branch has, in addition to its territory in part of Wisconsin and part of Illinois, the Counties of Lake, Porter, LaPorte, St. Joseph, Elkhart, Starke, Marshall and Kosciusko, which are Counties within Indiana
65 lying south and east of Lake Michigan and geographically close to Chicago. The Indianapolis branch territory consists of all the remaining Counties in the State of

Indiana, also the Counties of Douglas, Edgar, Coles, Clarke, Cumberland, Jasper, Crawford and Lawrence in the State of Illinois. The territorial allocations of the various branches existed several years prior to the year 1933 as set forth above without change. They were established in the first instance primarily on the basis of the distance from the branch to the County seat of the Counties in the territory. Geographical and topographical factors were also considered in the establishment of territories, as were also transportation facilities.

Finding No. Eight.

(a) All dealers on or before the 10th day of each month place "orders" for the cars which they desire for the succeeding month. Such orders are placed on a form provided by the Company, and the dealer indicates in complete detail the class of car, whether Ford, Mercury or Zephyr, the body type, the color combination, the type of tires, the kind and color of upholstery and the special equipment, such as radio and heater to be placed in each car. Such orders are forwarded by the dealer to the branch of the Company to which the dealer is assigned, and when received are tabulated by the branch on the car and truck requirement form provided by the plaintiff, and on or before the 15th day of each month, the branch advises the plaintiff's home office of Dearborn of the total requirements of dealers, which is the number of units dealers in the territory estimate they can sell, of the branch for the succeeding month. Such "orders" are furnished to the plaintiff pursuant 66. to, and subject to the provisions of, the Sales Agreement set out in Finding No. Five.

(b) Thereafter and about the 23rd of each month, the home office of the plaintiff sends to the branch car allotments for the succeeding month. The allotments are based on the requirements of the branches after the necessary adjustment to production schedules and assembly plant capacities. When cars are in demand and the plaintiff's plant at Dearborn and its various branches are operating at capacity, the branch's statement of requirements may be reduced on the allotments, since the supply of cars is limited to the productive capacity. When the seasonal demand for cars is low, the allotment to branches may be slightly increased over the stated requirements in order to maintain a full time or part time production schedule.

(c) The branches that have assembly plants are notified on the allotment form of the branch or branches to which cars and trucks to be assembled will be shipped, and of the number for their own dealers. The branches that have no assembly plant are informed as to the branch or branches from which the cars allotted to them will be shipped.

(d) Immediately after the allotments to branches the branches prepare a schedule of shipments to dealer in accordance with the dealer's orders previously placed. The schedule covers the entire month and indicates the details of the scheduled delivery of the various cars ordered, as to type, color, upholstery, special equipment, etc. In some cases the schedule of deliveries will be sent to dealers only at ten days intervals. But in any event they are sent out at least ten days in advance of delivery.

(e) On the basis of branch allotments, the plant at 67 Dearborn schedules the shipments of the necessary parts for assembling the cars scheduled for assembly at the various assembly plants. The schedule is so timed that the parts arrive by train loads twice or oftener a day at the assembly plant and are unloaded at the end of various sub-assembly lines. At the assembly branch, a production schedule is built on the basis of scheduled shipments, and a production order is prepared for each car which carries the entire detail as to the type of car, color, upholstery, equipment, etc. These production orders tie in with the assembly schedule, and the cars are assembled in the order of the serial number of the production orders, without regard to the type of car. Thus, for example, the cars will come off of the assembly line in the production order routine. One car may be a two-door black sedan. The car immediately following it may be red open sport car with built-in radio and white side-wall tires. The car immediately following it may be a cab-over-engine truck, and the next may be a station wagon and so on. From the individual production orders which are prepared before the process of assembly starts, clerks at the branch prepare an invoice on the regular form of the plaintiff which describes the car, the color, the type of upholstery, special equipment, is dated as of the date it is prepared, and is addressed to the dealer who had previously ordered the car and contains the price of the unit complete with all charges. The invoices some times are prepared two or three days in advance of assembly of the cars. At the

Chicago branch after January 15, 1937, the invoices were not prepared until the motor was placed on the chassis and the invoice bore the motor number, but the invoices
68 were ready before the car was off the line. These invoices when prepared in all cases are placed in the same order as the production orders, and are sent to a station some one hundred feet or more from the end of the assembly line. A man at this point, when the car comes down the line, takes the invoice and places it on the windshield of the still incomplete car. The production and invoicing are so integrated that the cars come down the line in the same order that the invoices are in so that the top invoice in each instance matches the next car on the production line. All cars are built to some dealer's order (cars are at times diverted as stated in Paragraph (n) infra). At the end of the line, a checker reviews the invoice to the dealer and determines whether the car matches all of the details of the dealer's order reflected on the invoice, and whether the car has all of the required equipment.

(f) The car then rolls off of the end of the line to the door of the assembly building where it is filled with gas and oil, and then is driven out of the plant by an employee of the plaintiff, and on the grounds of the plaintiff receives a short road test and a final check. It is then brought to the gate of the assembly branch and at that gate a representative of the independent truck-away company, or the dealer himself who is to receive the car checks the car with the car checker of the plaintiff. If the car is found to match the invoice, the checker of the plaintiff at gate signs the invoice on the line marked "Initials of Car Checker." The dealer or the independent truck-away company as agent of the dealer signs the invoice on the line marked
"Signature of Dealer (indicating receipt)", and dates his signature with the date that the car leaves the gate.
69 The dealer, or the dealer's representative of the truck-away company, then gets into the car and drives it off of the plaintiff's property.

(g) Three copies of the invoice were made when the car was going to a dealer of the branch assembling the car. The original went to the dealer and the second and third copies to the accounting department of the branch. A fourth copy was made when the car went to the dealer of another branch. This fourth copy was sent directly to the branch with which the dealer was connected.

(h) It has been a custom of long standing for the employees of the truck-away company to sign for the dealers as their agent. All dealers know of the practice, and have acquiesced fully in it.

(i) No cars or trucks are sold by the Company on open account. The dealer by arrangements with his branch either (a) pays for the car in full before it leaves the gate (mostly cases where dealer picks up the car personally or has a customer pick it up); (b) pays for it by finance papers covering all or part of the purchase price either executed at the branch by the representative of the truck-away company, who is duly authorized by a power of attorney to execute on behalf of the dealer such paper, or signature of the papers at destination by the dealer himself; or (c) payment at destination to the truck-away company for the car in full or the balance due on it on delivery to the dealer. At all branches except the Chicago branch finance papers are signed by the employees of the truck-away companies as agents of the dealer. Plaintiff for information keeps a file of copies of powers of attorney given by dealers to the finance companies for the employees of the truck-away companies to execute such finance papers.

At the Louisville and Cincinnati branches the finance 70 papers on the portion of the sales price that is financed are signed at the cashier's cage in the plaintiff's branch before the car or truck leaves the gate of the branch. All such papers are dated the day they are signed. This procedure is followed regardless of whether the car is going to a dealer of that branch or to a dealer of the Indianapolis branch. Collection is made at the destination for only that portion not financed. At the Chicago branch no powers of attorney are used by the finance companies and the finance papers on all cars going to dealers of the Chicago branch are signed at the dealer's place of business on arrival of the car or truck. On cars shipped from the Chicago branch to dealers of the Indianapolis branch, the finance papers are signed by employees of the truck-away company who have authority by powers of attorney from the dealers to sign the papers. The finance papers are presented to the Indianapolis branch already signed. Whether they are signed in the Chicago office of the truck-away company or in the Indianapolis office of the truck-away company does not appear. On shipments out of the Indianapolis branch from stock, finance papers are also

signed by the truck-away company at its Indianapolis office. The finance papers so signed by the truck-away company's employees as agents for the dealers are "trust receipts." The trust receipt recites that a "security interest" in the car or truck described "has passed to the Entruster (finance company)" subject to the usual rights of the Entruster to cause the security by sale or otherwise to be applied to the debt, with the usual covenants by the "Entrustee (dealer)" as holding for the Entruster and selling only upon his consent. Such trust receipts are executed by the parties with full knowledge of the plaintiff. The truck-away company would pick up at the dealer's place of business in Indiana, on delivery of the car or truck, the type of paper which was approved for payment of the balance due on the car or truck, i. e., a check, a certified check, or a bank draft, and collect the delivery charges, and such charges and such paper were then taken by the employee of the truck-away company on a return trip and delivered to the branch from which the car was shipped, except that in the case of the dealers of the Indianapolis branch the payment during part of the period, as hereinafter explained, was taken to the Indianapolis branch rather than to the branch from which the car was shipped.

(j) In many instances where the cars or trucks are partially financed, the finance papers have been sent from the branch to the office of the finance company located in the same city as the branch and money paid on the paper to the plaintiff before the car or truck is delivered to the dealer. The truck-away company in many instances holds a car for two days or more to make up a load, while funds are paid on finance paper to the branch on the same day as the receipt of the paper.

(k) That the invoice signed at the gate by a dealer, or his agent, a copy of which is left at the company, is as follows:

72 Plaintiff's Deposition

EXHIBIT NO. 9-D

Nov. 18, 1941

Paul C. Carpenter

Notary Public State of Indiana

Form 419-C

Shipping Branch Reference
 Ford Motor Company
 Incorporated

Invoice Date

852 IPLS Louisville, Ky.

Invoice No. C 126003 C

11 17 41

Branch Paid or Release Stamp
 Bank Orders or Adjustments

Sold

to 454 John Doe

Doeville, Ind

Shipped to and Same

Destination

Date Shipped

UCC

Car Initial & No.

How Shipped and

PPD Cent. Trailled 95

Route

Quantity	Description	Unit Price	Amount
1	Super Dlx Sedan Coupe Fl R Blue Mon		700.00
	NT-AC 1.74 of 3.48		5.22
	Convoy Collection Charge		.10
	Company's Charge for distribution and delivery		30.50
	Federal Tax—Tires		4.18
	Federal Tax—Passenger Autos		50.27
	Federal Tax—Com'l and Truck		4.42
16 Gals 5 Gals	Qts. 9 Pts. Gals. Antifreeze		2.00
	Sales Promotion Material		
3			
	Invoice Total		801.11
	Initials of Car Checkers		720.00

Signature of Dealer (indicating receipt)

73 That it has been a custom of long-standing for employees of the truck-away or convoy company to sign the foregoing invoice for the dealers and to accept the cars for them. All dealers know of the practice and have acquiesced fully in it. The plaintiff looks to the truck-away company for payment in full. In the event the truck-away or convoy company fails to collect for the car or truck in the manner specified by the plaintiff, it is obligated to and does make good the price of the car or truck to the plaintiff. The risk of loss of the car or truck is the truck-away or convoy company's, until delivery is made by it to a dealer.

(1) The truck-away or convoy companies were not owned by the plaintiff. Up until sometime in 1937, they operated as contract carriers for the plaintiff, and thereafter as common carriers under permits of the Interstate Commerce Commission, for the transportation and delivery of the cars involved to the dealers in Indiana, and for and on behalf of the plaintiff made collections from such dealers in Indiana of delivery charges on such cars, and made collection of other amounts from such dealers in Indiana for and on behalf of the plaintiff as herein set out.

The plaintiff actually paid the truck-away or convoy company for the delivery charge in the first instance; by a specific item of "Company's Charge for Distribution and Delivery" set forth on every invoice, plaintiff charged the Dealer with freight F.O.B. Dearborn, Michigan, regardless of the point from which delivery is made, and made the truck-away or convoy company which delivered such products its agent for the collection of such charges from the Dealers in Indiana and the remission thereof to the branch from which the Dealer obtained such products, which collections were so made from said Dealers in Indiana before, or concurrent with the delivery of said products to them.

74 (m) The truck-away or convoy companies, while acting as contract carriers, prepared and took from the dealers a receipt upon which was printed the name of the carrier, the number of the receipt, the date of the instrument, the general form being shown by the following:

“Central Truck-away System, Inc.
Riley 4668 Indianapolis, Indiana
No. 21198

C.O.D. \$67.86

Paid by Check No. Date 3-4-36.

Received of Ford Motor Company, Louisville, Kentucky,
the following Ford automobiles to be delivered to

Dealer's name (Frank Hatfield Co.

Address Indpls., Ind.

(then follows Auto Order No., Model, Motor No., and
Charge)

Trailer No. 30 Driver Vise”

On the bottom of the receipt was the following:

“The above Ford automobiles were received, complete
and in good condition.

Dealer's signature

After the truck-away companies or convoys became com-
mon carriers, the Uniform Domestic Straight Bill of Lad-
ing was used which provided, among other things that

“The consignor shall be liable for the freight and all
other lawful charges”.

The plaintiff was aware that these forms were used but
the forms were not prepared by the plaintiff but by the
convoy or truck-away companies, and the forms were com-
pleted after the cars or trucks had left plaintiff's branch
gate and were taken to the convoy or truck-away com-
pany's property.

(n) In some instances cars were re-billed by the plain-
tiff. Such re-billings might result from any one of the
following causes: (1) an error in the original billing; (2)

a refusal of the dealer to accept the car; (3) if a car
75 was originally billed out to a dealer on a C.O.D. basis,
and the dealer decided he wanted to finance that car,
it would be rebilled by plaintiff; (4) a great many times
cars were re-allotted by the plaintiff's car distributor to a
more urgent order than the one for which there was an
original billing, and such cars were taken from the dealer
to whom it was billed and re-billed by the distributor to
some other dealer to save a sale to a dealer's customer;
the distributor had authority to do this without contacting
the dealer, and such distributor could change the specifica-
tions, rebill such cars before taken off the assembly line,

or while they were still on Ford property and before they went out the Ford gate, while on the transit company's lot or while in transit, and after they reached the dealer. The plaintiff's car distributor controls the priority of delivery. The other dealer's order is subsequently filled by the plaintiff if dealer still desires delivery.

(o) The driver of the truck-away company brought back to the branch office a report, giving the exact reason for the return of the unit, which guided plaintiff in its further operations and rebilling, and from those records it could be ascertained whether the dealer actually refused the car because he did not want it; these records were normally kept in the regular correspondence files, but such files for the year 1937 of the Indianapolis office have been destroyed by plaintiff, as such files are discarded by it every three years.

(p) An analysis of rebillings made by plaintiff from the Indianapolis branch for the month of March, 1941 (not within the taxing period), shows the following:

Total number of cars billed out...	2454
Total number of rebillings	95
Rebilled because dealers refused to accept	38
Rebilled for other reasons	57
	<hr/> 95

76 A typical reason for the rebilling of the 57 was to give some dealer preference over the dealer to whom the car was originally consigned. The number of rebillings would run less percentage wise in the year 1937.

(q) An analysis of invoices for the year 1937, as made by witness R. E. Gage, an auditor for the defendants, shows the following:

	Indpls. Branch	Chicago Branch	Lo'ville Branch	Dearborn Branch	Total
Billing					
1—Invoices voided	92	1	—	—	93
2—Returned on M. R. S.*....	188	121	338	103	750
3—Rebilled on New Invoice No.	209	22	124	33	388
4—Rebilled on same Invoice No.					
(a) Changed S/D to U.C.C.	14	57	306	71	448
(b) Changed basis of note and payment	86	3	106	16	211
Total	589	204	874	223	1,890

* M. R. S.—Merchandise Returned Sales
(Cars returned to Indpls. Branch)

EXPLANATION OF ITEMS
(by witness Gage)

- 1—Invoices voided—includes invoices made out covering sale of unit, which sale was never completed.
- 2—Returned on M. R. S.—includes all units actually shipped to dealers which were refused upon delivery for various reasons, and unit returned to Indianapolis Branch.
- 3—Rebilled on new Invoice No.—includes all units actually shipped to dealer and upon refusal of dealer to take same, was delivered to another dealer by the carrier on Ford's instructions.
- 4—(a) Changed from S/D to U. C. C.—includes units delivered to dealer and before accepting delivery from carrier, terms of sale were changed from sight draft to U. C. C. finance.

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- (b) Changed basis of note and payment—includes units delivered to dealer by carrier and before accepting delivery, dealer changed finance papers as to payment and amount, with approval of Ford and carrier.

The total changes in billings reflected above is approximately two per cent of the total billings.

(r) Witness Charles E. Volmer, chief clerk for the plaintiff at the Indianapolis branch, testified that there was no method by which it could be ascertained from the invoices themselves whether the car was refused by the dealer or rebilled for some other reason, and that there were several reasons for rebilling, including diversion by the car distributor before the car reached the dealer, or change in the method of financing at dealer's request; he stated that such information could be obtained only from the correspondence files, which, for the year 1937, had been destroyed pursuant to the company's regular practice. However, I find that the invoices themselves showed whether they were "voided" or "cancelled", being so

marked as to what was done with them; they also showed "Merchandise Returned Sales", that is, cases where units were shipped to a dealer from an out-of-state branch, which were refused upon delivery for various reasons and the unit returned to the Indianapolis branch—the exact reason for such return being shown on the driver's report; in such cases the invoice would generally have a notation "M.R.S.", with a number on it, which indicated it had been returned to the Indianapolis branch, although in some cases it was written out "Merchandise Returned Sales"; the invoices also showed cars that were rebilled on new invoice numbers, and those rebilled on same invoice where terms of sale were changed as to method of financing.

(s) In the seasons of the year when production may exceed demand, a few cars are built without specific dealer specifications, and there are held at the most convenient branch. Some reach the Indianapolis branch. Also, a few cars, as many as twenty-five to thirty, are used at 78 each branch by the representatives of the plaintiff, and when these cars have ten to twelve thousand miles on them, they are sold by the plaintiff as used cars. These cars may have such mileage in three to four months. Inventory records are kept at all the branches of not only the extra cars on hand, but if the cars in use by Company representatives. There are more than fifty-two different body color and style combinations of cars and trucks. Whenever dealers place orders for cars that are on hand at the branch, the order is immediately filled from the cars on hand instead of ordering a car to be assembled to fit the order. The effect is to keep the inventory of cars at a minimum in order to avoid carrying the investment in the car. The Indiana Gross Income Tax is always paid on all cars sold from those on hand at the Indianapolis branch except those shipped to Illinois dealers.

(t) All parts sold by plaintiff were shipped to dealers either (a) on open account, (b) C. O. D. or (c) with sight draft attached from the branch of plaintiff in whose territory the dealer was located. The parts were shipped by mail, express or truck as designated by the dealer. Parts in some instances are picked at the branch by dealers. The total gross receipts from part sales during the period involved from the branches involved were about 1.96% of plaintiff's total gross receipts from such branches.

(u) Remittances when received from dealers are deposited by the branch at a bank in the City where the branch is located to the credit of the plaintiff. The Dearborn office of the plaintiff from then on controls all funds so deposited.

(v) From January 1, 1935 up to dates hereinafter mentioned, the receipts for all cars and trucks delivered to dealers of the Indianapolis branch went back to the branch shipping the car, thus to either Dearborn, Chicago, Cincinnati or Louisville. No payments were received at the Indianapolis branch. The Indianapolis branch received all remittances after September, 1936 on cars shipped from Dearborn after November, 1936 on cars shipped from Louisville, after January, 1937 on cars shipped from Chicago. Cincinnati was not supplying cars at that time, but as to cars subsequently supplied by Cincinnati, the remittances came to Indianapolis. The change in place of acceptance of remittances related only to cars delivered from out-state branches to dealers of the Indianapolis branch.

Finding No. Nine.

(a) Assembly plants of plaintiff receive shipments from Dearborn of all chassis parts, rear axles and motors which are shipped as assembled units, and body parts unassembled and unpainted. At the assembly plant, the bodies are assembled, painted, treated and upholstered, the chassis is assembled and the axle, motor and body mounted on the chassis. Chicago and Louisville are assembly plants as well as branches of the plaintiff. Cincinnati was an assembly plant operated until March 3, 1933, when it was shut down and operated only as a branch. It was reopened as a partial assembly plant, that is, for the assembly of chassis and the placing thereon of built up bodies shipped from Dearborn, from February, 1935 until May 27, 1937 when it was again shut down and has not since that time been operated except as a branch. Indianapolis was operated as an assembly plant and branch until December 15, 1932 when it was shut down and has not since been operated except as a branch.

(b) Modern car and truck assembly operations require single story assembly plants with sub and main assembly conveyor lines. Both Indianapolis and Cincinnati are old style "multiple story (four stories) buildings". The In-

dianapolis plant was designed for the building of Model T's, an early model of the plaintiff's car, which was much lighter and shorter and of simpler construction than its present V-8 Models which were produced from the years 1935 to 1939.

80 (c) Plaintiff kept on all of its assembly plants figures as to the efficiency of operation, based on operating costs and pay-roll hours per car assembled. In the year 1931, plaintiff was operating throughout the United States thirty-one assembly branches. As business during that year had regularly fallen off until many of the branches were assembling less than one hundred cars a day, Indianapolis at this time was building only 36 cars a day and operating on two or three days a week. A survey was made of the efficiency figures, and of the character of the plants, whether of the modern or of the multiple story type, and on the basis of this survey, twenty-four of plaintiff's assembly plants were closed. The only plants left in operation were Edgewater, New Jersey, Chester, Pennsylvania, Summerville, Massachusetts, Chicago, Illinois, Louisville, Kentucky, Kansas City, Missouri and Richmond, California, in addition, of course, to the River Rouge plant at Dearborn. The seven plants left in operation were all modern plants, and no four or six story plants were in the group. The seven were selected for their capacity, layout, location and adaptability. At the time the Indianapolis plant was closed, it required 75 to 80 man hours per car for assembly there, and the assembly average of the seven plants left in operation was between 55 and 60 man hours per car. As requirements for automobiles increased subsequent to 1932, six additional assembly plants were reopened. The nearest to Indianapolis being so reopened were ones at Buffalo, New York and at St. Louis, Missouri. The plants so opened were selected on the basis of adaptability to construction of the new Ford V-8 car, plus the efficiency of the plant, i. e., its modern construction and its location to the market nearest the greatest demand for automobiles.

(d) Plaintiff has never reopened the Indianapolis plant for the reason that the capacity of nearby assembly plants of greater efficiency is larger than the need in the market area. In low capacity plants, such as Indianapolis
81 (75 cars a day), the fixed overhead costs make production more expensive than at plants of large capacity, such

as Louisville and Chicago. Also, the Indianapolis plant is not adaptable to the V-8 cars that the plaintiff has built since 1933. The V-8 cars built since 1933 are so long that they can not be taken up and down the elevator shafts in the building. The Indianapolis assembly plant was sold in December, 1941.

(e) During the period covered by the tax in this suit, there was very little equipment in the plant; in fact, less than ten percent of the necessary equipment for the assembly of cars was available in the plant. To equip and prepare the plant for operation would cost at least \$75,000.00, and the plant if operated would cost more to operate than any other plants in operation.

(f) The Indianapolis area is surrounded by modern plants of great capacity, and there was during this period no need for an assembly plant there.

Finding No. Ten.

(a) On July 1, 1938, a notice of proposed assessment of additional gross income tax for the years of 1935, 1936 and 1937 was mailed to plaintiff by defendant over the signature of the then Director of the Gross Income Tax Division of the Department of Treasury as follows:

For the period ending December 31, 1935,
in the amount of \$27,215.90

For the period ending December 31, 1936,
in the amount of \$20,027.97

For the period ending December 31, 1937,
in the amount of \$14,250.62;

with notice that interest at the rate of 1% per month from the date the tax was due, and penalty, would be added when final assessment was made.

82 The major cause of the additional assessment asserted by the department was due to the imposition of a tax upon gross receipts by plaintiff from sales where cars, trucks or parts were shipped directly from the plaintiff's factory at Dearborn, or from plaintiff's assembly plants at Chicago, Cincinnati, and Louisville, to dealers in Indiana who were assigned to such branches, and (1) where such products were paid for by such Indiana dealers in cash upon the delivery thereof at such dealers' place of business in Indiana, such payments having been made by such dealers to the employees of the truck-away or convoy companies upon delivery, and (2) where such products

were paid for by such Indiana dealers with finance papers, or a combination of finance papers, and cash, upon delivery thereof at the dealers' place of business in Indiana, such payments having been made by such dealers to the employees of the truck-away or convoy companies upon making such delivery, and in both instances the collections so received by the truck-away or convoy companies were by them taken and delivered in due course to the respective branches of the plaintiff aforesaid entitled to receive the same, were deposited by such branches in their regular depository as hereinbefore found, and were thereupon subject to the further order and disposition by the plaintiff as its property; these may be properly referred to as "Class A" sales.

Additional taxes were assessed at that time upon the basis of receipts charged by plaintiff to compensate itself for federal excise taxes collected from the plaintiff by the federal government, but specifically charged by plaintiff to and collected from its dealers, as well as certain other minor items not now involved in this action.

83 (b) The plaintiff also claims a refund on what it describes as "Class B" sales, which represents sales by the plaintiff to dealers in the Indianapolis branch territory in Indiana where shipment was made directly to such dealer either from plaintiff's factory and assembly plant at Dearborn or from its assembly plants at Chicago, Cincinnati or Louisville. Up to December 31, 1937, plaintiff voluntarily paid on regular quarterly returns the amount of tax on its gross receipts from such sales. After that date, and up until June 2, 1939, no tax was paid on such sales, but on that date, plaintiff filed its amended returns for the year 1938 and the first quarter of 1939, and voluntarily paid with interest the tax on its gross receipts from such sales. The tax was paid to stop the running of interest at the rate of one per cent per month in the event the Department assessed an additional tax on the gross receipts from such sales. At the time of this payment, plaintiff requested a refund of such tax. Plaintiff had previously requested a refund of the tax on the gross receipts from such sales paid voluntarily during the years 1935, 1936 and 1937. The tax so paid by plaintiff on its gross receipts from said "Class B" sales, refund of which is sought in this suit, with interest, was as follows:

	1936	1937	1938	1939 (1st Quarter)	Total
Tax	\$2,079.62	\$21,349.98	\$7,371.15	\$4,442.80	\$35,243.55
Interest	256.22	1,397.98	294.85	66.64	2,015.69
					<u>\$37,259.24</u>

(c) Within the time allowed by law and the regulations of the defendant department, and on July 28, 1938, the plaintiff filed written and verified objections to such proposed additional assessments referred to in paragraph (a) of this finding No. Ten for each of said years.

84 (d) Subsequently, following a hearing on September 7, 1938, the defendant department, over the signature of Elmer Marchino, a Hearing Member, on January 6, 1939, issued a ruling denying the objections of the plaintiff and directing the audit section to proceed with notice and demand for the additional tax.

(e) Under the date of January 7, 1939, a notice and demand for each of the periods for the additional tax assessed, plus interest, was issued and sent by registered mail to the plaintiff. The notice and demand required payment by January 17, 1939, of the following amounts of tax and interest:

	1935	1936	1937	Total
Tax	\$27,215.90	\$20,027.97	\$14,250.62	\$61,494.49
Interest	11,197.09	5,820.32	2,546.15	19,563.56
				<u>\$81,058.05</u>

85 The demand for \$81,058.05 was paid. Afterward items agreed upon by the parties as taxable, which are now immaterial, reduced the amount of the claim to the sum of \$78,514.10, as stipulated by the parties in the stipulation prepared for trial of this cause, dated December 1, 1941, which stipulation is as follows: It is agreed that during the period from January 1, 1935 to December 31, 1937, the plaintiff has received gross receipts from the sale of cars, trucks and parts to dealers in Indiana of its Chicago, Illinois, Cincinnati, Ohio and Louisville, Kentucky branches, upon which additional tax and interest has been assessed as follows:

	1935	1936	1937	
Tax	\$26,656.81	\$19,901.31	\$13,173.18	\$59,731.30
Interest	10,854.72	5,591.95	2,336.13	18,782.80
				<u>\$78,514.10</u>

This item of \$78,514.10 was known and referred to by the parties in some of their discussions as the \$78,000.00 claim, and was thus distinguished from the claim of \$37,259.24, which was known and sometimes referred to by them as the \$37,000 claim.

(f) Subsequently and within the time allowed by law and the Regulations of the Gross Income Tax Division of the Department of Treasury, and on January 17, 1939, the plaintiff paid the additional tax fixed in the notice and demand in the reduced amount of \$78,514.10 as set forth above. Plaintiff also filed in the form required by law and by the Regulations, and at the same time, a petition for correction of the amount of the tax and refund of the excess tax for the years 1935, 1936 and 1937. In the petition, the plaintiff set forth objections not only to the principal
86 cause of the assessment but to the other minor causes.

The grounds of claim for refund of the principal amount of the additional assessment (the imposition of tax on the gross receipts from "Class A" sales) and also for the refund sought of the tax paid on gross receipts from "Class B" sales, were as follows: (1st) That the receipts were from commerce between the states, and under Section 8, Article I of the Constitution of the United States, the tax was void; (2) That the receipts were from transactions completed outside of the State and were not taxable under Section 1 (m) of the Gross Income Tax Act as amended, nor under Regs. 191 and 193 under the 1933 Act, and further, if such receipts were taxable, then the Act was in conflict with the Fourteenth Amendment to the Constitution of the United States; (3rd) All of the tax assessed on Class A sales for the year 1935 and that portion of tax for the year 1936 collected for the first three quarters was not assessed "at any time within two years after the time when the return covering such gross income was filed, and after due notice by registered letter, to the taxpayer", and such assessment for the aforesaid periods was therefore void. Plaintiff's refund petition also set forth as Exhibits schedules demonstrating certain errors in the original audit figures of the figures of the defendants which were attached to the notice of proposed assessment of July 1, 1938.

(g) Subsequently a supplemental audit was made on the basis of the schedules attached to the petition for refund, and under the date of February 25, 1939 such sup-

plemental report was submitted to the Gross Income Tax Division, Department of Treasury, by the Audit Section, and certain adjustments were made, indicating agreement in certain errors of the original audit of July 1, 1938, and allowing a \$3945.16 refund (which sum was accepted wholly without prejudice to the rights of either party on the basis of over-assessment due in part to the adjustments and due also in part to the provision in the ruling of January 6, 1939 allowing the return of money assessed on account of cars where the dealer picked up the car at the outstate branch and paid for it there.

(h) On March 22, 1939, the Gross Income Tax Division of the Department of Treasury, over the signature of the Chief of the Audit Section, disallowed the plaintiff's petition for a refund of the amount of the tax and refund of the tax for the years 1935, 1936, and 1937, on both Class A and Class B sales, except upon the one point stated above.

(i) Subsequently, the plaintiff, in order to stop the running of interest, filed its amended annual return for the year 1938 and for the first quarter of the year 1939, reporting and paying tax on the gross receipts from Class B sales for such years. The tax and interest so paid at the time and sought by refund petition filed concurrently with the payment was in the amounts as follows:

	1938	1939 (1st Quarter)	Total
Tax	\$7,371.15	\$4,442.80	\$11,813.95
Interest	294.85	66.64	361.49
			<hr/> \$12,175.44

Subsequently and on June 3, 1939, the Gross Income Tax Division of the Department of Treasury disallowed said petition and rejected the claim and refund in full. This sum of \$12,175.44 is a part of the \$37,259.24 reflected in

Finding No. Ten above.

88 (j) The amount of the tax and interest assessed and paid, as stated in Finding No. Ten (e), which is asserted by the plaintiff under paragraph (d) on page 10 of its original complaint to have been assessed without right or authority for the reason that the defendants 'did not at any time within two years after the time when the return

covering such gross income tax was filed give due notice by registered mail to the plaintiff of such assessment', is in the amounts as follows:

	1935	1936 (1st Quarter)	1936 (2nd Quarter)	1936 (3rd Quarter)	Total
Tax	\$27,215.90	\$4,810.01	\$6,949.48	\$5,860.56	\$44,835.95
Interest	11,197.09	1,587.30	2,084.84	1,582.34	16,451.57
Total.....					\$61,287.52

89 Finding No. Eleven

The amounts sought to be recovered in this action, together with the amounts of interest collected thereon, also sought to be recovered for the respective periods, are as follows, to-wit:

	1935	1936	1937	1938	1939 (1st Quarter)	Total
Tax	\$26,656.81	\$21,980.93	\$34,523.16	\$7,371.15	\$4,442.80	\$94,974.85
Interest .	10,854.72	5,848.17	3,734.11	294.85	66.64	20,798.49
						\$115,773.34

Plaintiff, within one year prior to the institution of this action, filed with the Department of Treasury petition for refund in proper form seeking to recover all of the foregoing tax and interest. Prior to the commencement of this action the defendant, the Department of Treasury, had denied said petition for refund and had notified plaintiff thereof in writing. Defendants have refused to pay the plaintiff said tax and interest so assessed and which the plaintiff has been required to pay. Plaintiff has taken all of the steps required by law to be taken before the filing of this suit for refund, and said suit has been filed in the manner and within the time allowed by law, the complaint having been filed on June 7, 1939.

90 Finding No. Twelve

As of November 25, 1940, the plaintiff by letter written and signed by its counsel, requested a rehearing on its petition for refund theretofore filed, stating in such request that the case was set for a pre-trial conference in the Federal Court on the following day: that preliminary conferences between counsel for plaintiff and the Attorney General's office had developed a situation which counsel for plaintiff believed merited the reconsideration of the case; that facts not known to counsel for plaintiff at the time the

matter was presented to the Department, presented, in the opinion of such counsel, an entirely different legal situation.

Said request for a rehearing was granted by the Department.

Finding No. Thirteen

(a) On November 26, 1940, at a pre-trial conference in this case, at the suggestion of Joseph P. McNamara, Deputy Attorney General representing the defendants, this case was continued in order that it might be reconsidered by the Department of Treasury, but was reassigned for trial on March 24, 1941.

(b) Subsequently, and in December, 1940, and January, 1941, Joseph P. McNamara and Elmer F. Marchino, Hearing Judge for the Department of Treasury, went with the plaintiff's Attorney to plaintiff's branch at Louisville, 91 Kentucky, and its home office at Dearborn, Michigan, to make a further investigation of the facts on hearing. The Department had before it all of the information in its audit file from the audit made prior to July 1, 1938, and the supplemental audit made under the date of February 25, 1939, which audits were extensive. All records of the Company at all of its branches and at its home office were available to the Auditors for those audits. Subsequently, in January of 1941, McNamara, in talking with Mr. Ice, attorney for the plaintiff, expressed as his opinion the position that the tax sought to be refunded in the case, should be refunded. He said further that he felt this was Marchino's view, but that one difficulty was that Marchino would have to in effect reverse himself. Ice suggested that the additional information developed at Louisville and at Dearborn in December, 1940, and January, 1941, was not presented at the time of the hearing on the notice of proposed assessment in 1938, and that perhaps a letter to Mr. Marchino setting out these as new facts would help. McNamara stated that he thought it would, and subsequently such a letter was written. In the letter written on January 10, 1941, to Marchino pursuant to this conversation, counsel for the plaintiff stated that they had always made it a practice to reveal all of the facts known to them to the Department at the time of the hearing of the case; that 92 upon the question of facilities, there was further detail in the testimony that developed from the trip to Louisville, and Dearborn with McNamara and Mar-

chino that they did not have at the time of the hearing; that they did not know the precise manner in which the cars were ordered, how the orders were completely filled, and how cars were all signed for, even to finance papers, at the gates of the company at Cincinnati, Louisville, Dearborn and Chicago; that they had the general outline of this picture which was presented at the hearing, but the details, which are important in these cases, did not become apparent until the meeting with the officials at Louisville a day or two prior to the time that you (Marchino and McNamara) came down to Louisville; that it was at this meeting that these authorities to sign title papers and the other matters came to light,—such as the placing of the invoices on the cars ordered three days before, before those specific cars were off the end of the assembly line.

(c) At a conference at the Department of Treasury in the office of Mr. Marchino on February 4, 1941, Mr. Marchino and Mr. McNamara stated to the attorney for the plaintiff that they thought that the money should be refunded, and that they were ready to write an opinion to that effect.

(d) Upon granting such rehearing, a method had to be devised to get the matter back before the Department, as it had disposed of it on the previous hearing by ruling against the plaintiff; plaintiff's attorney, Mr. Ice, suggested that judgment be entered in the case; Mr. McNamara said they would prefer that there wouldn't be any record in court, and either Marchino or McNamara suggested that plaintiff's attorney write a letter to the
93 Department requesting a rehearing, and that such letter be dated back prior to the pre-trial conference of November 26, 1940, and the Department would then proceed to issue a new opinion; this letter was written on February 4, 1941, dated back to November 25, 1940, and is the letter referred to, and the substance of which is set out, in Finding No. Twelve.

(e) Marchino, McNamara and Mr. Ice, at that time discussed at some length the method of handling the procedure from there on out; the theory on which a refund was to be made, as Mr. Ice understood it, was that the sales were delivered at the outstate branches, and Marchino and McNamara pointed out that that meant a tax on the sales from the Indianapolis Branch into Illinois, if they were handled the same way; Ice told them he didn't know whether they

were handled the same way, but he would find out from the Indianapolis Branch Manager and give them a letter as to how those were handled; Marchino and McNamara then said that after the ruling had been given to Marchino, it would be necessary to make an audit of part of the figures. Mr. Ice agreed with them that the \$37,000 claim had never been, but had to be, audited, and pointed out to them, and they agreed, that the \$78,000 part of the claim had been audited and those figures agreed upon at the time it was paid.

(f) On February 5, 1941, Mr. Hewitt, of the Department, called Mr. Ice by telephone and said he knew what Marchino and McNamara were planning with reference to the refund and wanted to know whether plaintiff paid net income tax in Kentucky on sales out of the Louisville Branch into Indiana; he said that the refund that would be made here was a very large one and he wanted to feel that he was on sound ground on it; when told a day or so later by Mr. Ice that plaintiff did take into the base, for determining its net income the Kentucky tax on the Kentucky sales into
94 Indiana to dealers of the Louisville Branch in Indiana, Mr. Hewitt said, "I feel relieved about that. This is a very large refund and that confirms the position of the Department, doesn't it?"

(g) Elmer F. Marchino, as the Hearing Judge of the Department, issued and furnished to the plaintiff two different written orders bearing upon the question of the right of plaintiff to such refund, one dated January 6, 1939, and one dated March 1, 1941; omitting salutation and signature, each thereof is as follows:

January 6, 1939.

"Reference is being made to the formal hearing which was held in the offices of the Gross Income Tax Division in the matter of the above named taxpayer corporation on September 7, 1938. This hearing was occasioned by the taxpayer's objections to the proposed additional assessment of gross income tax, which was made and contained in a Notice of the Department, issued under date of July 1, 1938. According to the facts submitted, the Ford Motor Car Company was incorporated under the laws of the State of Delaware, and is engaged in the manufacture and sale of Ford automobiles, tractors, various accessories and

supplies for automobiles and tractors. The taxpayer corporation maintains various branches for the distribution of its products, both within and without the State of Indiana. The principal branch office in Indiana, is maintained at Indianapolis, Indiana. Certain out-of-state branch offices, serving portions of Indiana territory are located at Louisville, Kentucky, Chicago, Illinois and Cincinnati, Ohio. Each branch has its trading area from which the supply of its products are made to various dealers throughout that area.

The principal causes of the proposed additional assessment of gross income tax, resulted from the inclusion by the examiner of the entire gross receipts derived from the sale of this taxpayer's products to Indiana customers made from Indiana branches and out-of-state branches. The 95 auditor has also included in taxable income and disallowed a deduction taken for gross receipts representing Federal Excise taxes.

At the time of the hearing, the taxpayer objected to the inclusion of gross receipts derived by out-of-state branches from sales made to customers within the State of Indiana, contending that such transactions constituted transactions made in interstate commerce, and the gross receipts therefrom were not properly taxable under the provisions of the Gross Income Tax Law.

To this contention the Department cannot agree. The Department takes the position that the gross receipts of this taxpayer corporation derived from sales made to Indiana resident customers, where facilities exist in Indiana, for making supply of the products to such Indiana customers, even though such products are supplied and shipped from branches outside the State of Indiana are intrastate in character, and the gross receipts therefrom are properly taxable under the provisions of the Gross Income Tax Law. The Department also takes the attitude that it is not material as to the place of receipt of the payment for the products.

In this connection, the Department acknowledges the deductibility of gross receipts derived from a transaction wherein the Indiana customer makes purchase of products at this taxpayer's place of business outside the State of Indiana. The transaction being completed in its entirety outside the State of Indiana. This taxpayer does not have the obligation or the option, under the terms of the sale, to

make supply of the products from any other branch, or to transport or initiate the transportation of the products across state lines. The transaction is intrastate in character and completed at a business situs outside the State of Indiana.

The taxpayer also made objection generally to the proposal of the Department to make the assessment, as 96 proposed, for the calendar period of 1935 final in the matter, offering as a basis for his objection, the two year period of limitations contained in the Act, and that, therefore, the Department was without authority to make the assessment proposed final at this time.

To this contention the Department could not agree, calling attention to the fact that the Gross Income Tax Law was amended and became effective as of April 1, 1937. Under the provisions of the amended Act, the period of limitations was extended to three years. It is the attitude of the Department, that where the two year period of limitations had not expired prior to the becoming effective of the amended Act, then the period of limitations is extended for the additional period. Consequently, the Department has the authority to include in taxable consideration the calendar of 1935, and is not prohibited from making the assessment final for that period.

The Audit Section of this Department will proceed to issue a Notice and Demand for the tax found to be due in conformity with the terms of this letter of findings."

March 1, 1941.

"Reference is being made to the application of the Ford Motor Car Company for refund of certain amounts of gross income tax paid for the annual calendar periods of 1935, 1936 and 1937. This application for refund was filed on January 17, 1939, and after giving the application careful consideration the application was denied under date of March 2, 1939.

On November 25, 1940, the taxpayer corporation, through its attorney, submitted a petition for a reconsideration of the Department's denial of its claim for refund and requested a rehearing in the matter. The request for a reconsideration and a rehearing was based upon the contention of the taxpayer corporation that the transaction con-

cerning the sale of products manufactured or assembled by this taxpayer corporation at points outside of the State of Indiana, and there delivered to Indiana customers within the territorial limits of that outside branch or assembly plant constituted a transaction completed in its entirety outside of the State of Indiana, and thus did not fall within the purview of the Gross Income Tax Act.

The Department acquiesced to the taxpayer corporation's petition, and conferences concerning this matter were held with the officials of the taxpayer corporation's assembly plant at Louisville, Kentucky, on December 20, 1940, and with the executive staff of the taxpayer corporation's main office at Dearborn, Michigan, on January 7, 1941.

At these conferences evidence was presented to show that the Ford Motor Car Company, accepts orders for its products from Indiana customers. These Indiana customers are for the most part retail automobile dealers. The Ford Motor Car Company will make delivery of such automobiles to the Indiana customers or to their authorized agents at the delivery gate of its out-of-State manufacturing plant or assembly plant. Deliveries of the products desired by Indiana customers are made under conditions whereby the Ford Motor Car Company, at the time of the delivery to the customers or the customers authorized representatives, will be paid for the products, or appropriate financing will be arranged for by the customers or by their authorized agents.

It is further disclosed that the Ford Motor Car Company in regard to sales made to Indiana customers resident within the territorial jurisdiction of the outside manufacturing and assembling plants does not have the obligation or the responsibility, under the terms of the sale, to make delivery of the products desired by Indiana customers to those customers across State lines, nor does any obligation or responsibility to initiate such transportation across State lines exist. It is indicated that the entire responsibility of the Ford Motor Car Company to the customer ceases at the time of delivery of the products to the Indiana customers or to their authorized representatives at the delivery gate of the manufacturing or assembling plants outside of the State of Indiana.

It is, therefore, indicated that such a transaction is completed at a business situs entirely outside of the State of

Indiana, and that such a transaction is not a transaction made in interstate commerce, and that the question of facilities is not existent in this transaction.

The Department will accordingly take the necessary steps to make refund of the gross income tax paid on the transaction outlined above. This file will be remanded to the Refund Section of this Department for further handling."

99 (h) On March 5, 1941, counsel for plaintiff wrote a letter to Judge Baltzell, which, omitting salutation and signature, is as follows:

(Exhibit 9)

"The above case is set for trial on March 21. At the time of the pre-trial conference when the case was re-set, you will recall that the parties advised your Honor that there was a possibility of a refund of the taxed involved in this suit to the taxpayer.

In order not to disturb your trial calendar at too late a date, we wish to advise you now that on the 1st day of March, 1941, the Department of Treasury by its Hearing Judge, upon a reconsideration of the assessment involved in this case, ordered a refund following an audit of all of the tax sought to be recovered in the above action.

The only remaining steps are an audit to determine the amounts to be refunded, and the actual issuance of a warrant on the refund.

The plaintiff will dismiss the above case as soon as the warrants on the refund are drawn. We are advising you of the steps taken to date in this case and sending a carbon of this letter to the Attorney for the Department of Treasury in order that you may now remove this case from the trial calendar on March 21."

A copy of such letter was sent to Mr. McNamara.

(i) Thereafter, and before the trial date on March 24th, 1941, Mr. McNamara and Mr. Ice went to the office of Judge Baltzell and McNamara informed the Judge that the case had been settled and would not need to be tried on the 24th of March; the case was then taken off the trial calendar.

100 (j) Around the first of April, Marchino called Ice and said that Mr. Kennedy, the Head of the Audit Department, would like to go down to Louisville and verify

some of the facts given to them by Mr. Henry and Mr. Wright in December. Ice arranged for the trip, and Marchino, Kennedy and Gage went to Louisville on April 18, 1941, and reviewed what had been covered in December. Later, Marchino, Kennedy and Gage went with Ice to Dearborn, and there talked with Skinner, Wiesmeyer and Moffitt on the same facts that had been presented in January.

(k) On May 5, 1941, this case was called on the Federal Court docket, and, in open court, Mr. McNamara, in the presence of Mr. Ice, said to the court that the case had been settled and refund was to be made as soon as an audit could be completed of some figures; the case was then passed, without action, but Judge Baltzell stated that he would like to have it disposed by the 1st of July. On May 6, 1941, Mr. Kennedy, Chief of the Audit Division, directed a memo to Mr. Gage instructing him to proceed with the audit of figures at Louisville and attaching a form of working sheet to secure information 'required to contest any questions now involved in the refund suit pending in Federal Court'.

(l) About June 30, 1941, inquiry was further made by the Judge as to the disposition of the case, and Mr. McNamara said that the audit was well on its way to completion and he thought it was just a matter of a few days until it would be completed, and when it was completed, they would be able to make the refund.

(m) Counsel had another conference in September in the presence of the Judge, and again Mr. McNamara said to him that the audit was not complete but that it would be shortly. After McNamara and Ice left the Judge's office at this conference, McNamara told Ice that the situation at the Department was then such that the case would probably have to be tried; that after Mr. Kennedy got into it, there had developed some disagreement in the Department after the order had been given by Mr. Marchino; this was the first time that McNamara had told Ice that the case would have to be tried.

(n) No notice has ever been served on plaintiff, or its counsel, of the rescinding of the order issued by Mr. Marchino of March 1, 1941, and such order has never been rescinded.

(o) None of the representatives of the defendants ever stated to the plaintiff, or its counsel, that the Department

would refund to the Ford Motor Company \$78,514.10, or any other specifically designated amount.

(p) Marchino's order of March 1 indicates that the Department would take the necessary step to make refund of the gross income tax paid on transactions outlined in such order. Defendants did not know what plaintiff's gross income from such transactions was when said order was issued, nor until such audit was completed, and plaintiff and defendants understood that on the 1st day of March, 1941, the Department of Treasury, by its Hearing Judge, upon a reconsideration of the assessment involved in this case, ordered a refund following an audit of all of the tax sought to be recovered in this action.

Finding No. Fourteen.

That the audit made after the ruling of March 1, 1941, was not completed until December 1, 1941. That the audit indicated that a further refund should be made on one item of \$10,267.45 of gross receipts of tax at the rate of $\frac{1}{4}$ of 1% in the amount of \$25.67 to the Ford Motor Company; that this figure represented sales where merchandise is one hundred per cent financed at an out-of-state branch; that the item of tax in this latter amount was included with the item of tax found to be due and refundable under the 102 opinion of January 6, 1939, set out in Finding No.

Thirteen, which total sum of refund has been accepted without prejudice to the rights of either party as stated elsewhere in this finding.

Finding No. Fifteen.

At no time did defendant or any of its attorneys, agents or employees promise plaintiff that the sum of \$78,514.10, or any other specifically stated amount would be refunded to plaintiff. No certificate of over-assessment was issued to plaintiff by defendant at any time.

Finding No. Sixteen.

During the period from January 1, 1935 to December 31, 1937, the plaintiff received gross receipts from the sale of cars, trucks and parts to its dealers in Indiana assigned by it to Chicago, Illinois, Cincinnati, Ohio, and Louisville, Kentucky, branches, upon which additional tax and interest has been assessed by the Department and paid by the plaintiff, the taxes and interest so assessed and paid being as follows:

(Class A—Finding No. Ten)

	1935	1936	1937	Total
Tax	\$26,656.81	\$19,901.31	\$13,173.18	\$59,731.30
Interest	10,854.72	5,591.95	2,336.13	18,782.80
				<u>\$78,514.10</u>

That during the period from January 1, 1936, to April 15, 1939, the plaintiff received gross receipts from the sale of cars, trucks and parts to its dealers in Indiana assigned by it to its Indianapolis branch, where the cars, trucks and parts were delivered directly to the dealers either from Dearborn, Michigan, Chicago, Illinois, Cincinnati, Ohio, or Louisville, Kentucky, upon which tax and interest has been assessed by the Department and paid by the plaintiff, as follows:

103

(Class B—Finding No. Ten)

	1936	1937	1938	1939 1st Quarter	Total
Tax	\$2,079.62	\$21,349.98	\$7,371.15	\$4,442.80	\$35,243.55
Interest	256.22	1,397.98	294.85	66.64	<u>2,015.69</u>
					<u>\$37,259.24</u>

These are the amounts which the plaintiff seeks to recover by this suit, and aggregate the sum of \$115,773.34 as set out in Finding No. Eleven. None thereof has been refunded to the plaintiff; proper demand was made by plaintiff of defendants for the refund thereof within the time allowed by law and before the commencement of this action.

Finding No. Seventeen.

(a) I find that all of the cars, trucks and parts referred to in Finding No. Sixteen thus sold by plaintiff to its dealers in Indiana, were transported either from Dearborn, in the State of Michigan, or Chicago, in the State of Illinois, or Louisville, in the State of Kentucky, or Cincinnati, in the State of Ohio, and delivered to such Indiana dealers, in the State of Indiana; the transportation or delivery charges were paid in the first instance by the plaintiff to such carriers, with the agreement and understanding on the part of the plaintiff and such carriers that the carriers should collect the purchase price of such products, and such

delivery charges, and a sum equivalent to any tax imposed by any law of the United States or of any of the States upon the manufacture or sale of any of such articles, and any excise or other taxes or fees which might be imposed upon such products, or on account of such business, or on Dealer's stock, or plaintiff's products in transit to Dealers, from such dealers in Indiana concurrently with the delivery of such products to such dealers in Indiana; the title to such products was to and did remain in the plaintiff until the purchase price, and all said charges 104 thereon which were agreed to as between the plaintiff and such dealers, had been actually paid by such dealers; upon such payment the title to said products concurrently passed to said respective dealers, and said products thereupon came to rest insofar as interstate commerce and transportation were concerned; that for the purpose of expediting and facilitating the delivery of said products, and the collection of the purchase price and charges thereon where the dealer desired to finance the same, employees of said truck-away and convoy companies were given written authority directed to a particular finance company by such dealers to execute or endorse in behalf of such dealer, notes, acceptances, contracts and all other instruments or assignments thereof used in connection with such financing, and in many instances such employees acted for and on behalf of such dealers in the execution of such finance papers and acted as the agent of such dealers in relation thereto; that said truck-away and convoy companies acted as carriers for the purpose of transporting and delivering such products to such dealers in Indiana, and acted as the agent of the plaintiff for the purpose of collecting the purchase price and all charges thereon from such dealers in Indiana, and for the further purpose of transmitting and delivering such collections from the dealers in Indiana to the respective branches of the plaintiff entitled to receive the same; that with the knowledge and consent of plaintiff they acted as the agents of the dealers in the execution of the finance papers aforesaid, and which enabled them to collect in Indiana, for and on behalf of the plaintiff, 105 the cash or certified check for the full amount due on such products as directed and required by the plaintiff before the delivery of such products to said dealers.

(b) All of the gross receipts from the sale of cars, trucks and parts by plaintiff to dealers in Indiana, upon

which the taxes and interest were assessed and collected as shown in Finding No. Sixteen, were received by plaintiff while it was engaged in business in Indiana, and derived from sources within Indiana, from the sale and transfer of plaintiff's property which was thus transported to its Indiana dealers as aforesaid, and paid for by such Indiana dealers in cash upon arrival at their places of business in Indiana, or were paid for upon arrival at the place of business of such dealers in Indiana with finance papers executed as aforesaid, or a combination of cash and finance papers, collection having been made in both instances by the employees of said truck-away or convoy companies acting as the agent for the plaintiff in the making of such collections, and who, thereafter, in due course transmitted such receipts and collections to the respective branches of plaintiff entitled to receive the same.

106 Finding No. Eighteen.

(a) A third class of sales referred to as 'Class C' sales covers sales made of cars, trucks and parts shipped out of stock of the Indianapolis branch to dealers located in Indiana. The plaintiff has regularly filed returns within the time allowed and paid tax on the gross receipts from these sales. No refund is sought of such tax. All of the cars supplied for such sales were assembled outside of the State of Indiana and delivered to the Indianapolis branch from such outside points. The tax so paid on Class C Sales, no refund of which was sought was as follows:

1935	1936	1937	1938	1939 (1st Quarter)	Total
\$24,176.90	\$22,691.51	\$15,111.18	\$10,338.92	\$3,506.70	\$75,825.21

(b) The fourth class of sales, referred to for brevity as 'Class D' Sales, represents shipments made out of the cars, trucks or parts on hand at the Indianapolis branch to dealers of that branch located in the State of Illinois. No tax has ever been paid on the gross receipts from such sales. None has ever been assessed.

/s/ Robert C. Baltzell,

Judge.

Feb. 10, 1943.

Upon the above and foregoing Findings of Fact the Court now states its Conclusions of Law as follows:

Conclusions of Law.

Conclusion No. One.

The Court concludes for the defendants that the taxes for the year 1935 and for the first three quarters of 1936 were assessed and collected within the time required and allowed by law.

Conclusion No. Two.

The Court concludes for the defendants that no account stated arose between plaintiff and defendants.

Conclusion No. Three.

The Court concludes for the defendants that the tax assessed and collected on the basis of gross receipts from "Class A" transactions is not prohibited either by Article I, Section 8 of the Constitution of the United States or by the Fourteenth Amendment to the Constitution of the United States, and that such tax was lawfully assessed and collected by defendants.

Conclusion No. Four.

The Court concludes for the defendants that the tax assessed and collected on the basis of gross receipts from "Class B" transactions is not prohibited either by Article I, Section 8 of the Constitution of the United States or by the Fourteenth Amendment to the Constitution of the United States, and that such tax was lawfully assessed and collected by defendants.

Conclusion No. Five.

The Court concludes for the defendant that the law is with the defendants and against the plaintiff, and that plaintiff should not recover in this action.

Conclusion No. Six.

The Court concludes for the defendants that they should recover their costs from plaintiff.

Dated this 10 day of February, 1943.

/s/ Robert C. Baltzeli,
Judge.

108 (Entry for February 10, 1943, continued.)

It Is Therefore Considered And Adjudged by the Court that plaintiff recover nothing in this action, and that the defendants recover of and from the plaintiff their costs herein taxed at \$

It Is Further Ordered And Adjudged by the Court that Albert Ward be and he is hereby allowed the sum of \$750.00 for his services as Special Master herein, which said sum is to be taxed as costs to be paid by plaintiff.

109 And afterwards to wit at the November Term of said Court on the 14th day of April, 1943, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Comes now the plaintiff by its attorneys and files motion to set aside judgment, for restatement of Conclusions of Law and Judgment accordingly, which motion is as follows: (H. I.)

110 And afterwards to wit at the November Term of said Court on the 24th day of April, 1943, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Plaintiff files herein petition to vacate the judgment entered in this cause so that the Court may reconsider its decision, and the Court being duly advised now orders that the prayer of the plaintiff's petition this day filed be allowed, and that the judgment heretofore entered in said cause be and the same is hereby vacated and set aside, as prayed for in plaintiff's said petition.

111 And afterwards to wit at the May Term of said Court on the 30th day of June, 1943, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

This cause coming on for further hearing, the plaintiff being represented by James A. Ross, its counsel, and the defendants, being represented by David L. Day, Jr., and

Byron B. Emswiller, their counsel, the Court now denies and overrules the motion of plaintiff filed on April 14, 1943 to set aside the judgment and to restate its conclusions of law and judgment.

And it appearing that the Court on April 24, 1943, upon petition of plaintiff, entered an order vacating the judgment theretofore entered pending the decision in the State Court of the case of Department of Treasury, et al. *vs.* International Harvester Company, et al., and it appearing that the decision in said case now has been made final this Court does now proceed to render judgment in this cause upon the findings of fact and conclusions of law heretofore found and made by the Court on February 10, 1943.

It is therefore considered and adjudged by the Court that plaintiff recover nothing in this action and that defendants recover of and from plaintiff their costs herein taxed at \$.....

112 And afterwards to wit at the May Term of said Court on the 30th day of August, 1943, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Come now John J. McShane and Winslow VanHorne, deputy attorney generals and file appearance in place of Joseph P. McNamara, David I. Day, Jr., and Byron B. Emswiller, which appearance is as follows:

113 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—117) • •

APPEARANCE.

The undersigned, Deputy Attorneys Generals of the State of Indiana, hereby enter their appearance in said court in the place and stead of Joseph P. McNamara, David I. Day, Jr., and Byron B. Emswiller.

/s/ John J. McShane,

/s/ Winslow Van Horne.

114 And afterwards to wit at the May Term of said Court on the 1st day of September, 1943, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Comes now the plaintiff by its attorneys and files notice of appeal, which notice is as follows:

115 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Southern District of Indiana,

Indianapolis Division.

Ford Motor Company,

Plaintiff,

vs.

Department of Treasury of the
State of Indiana,

M. Clifford Townsend, Joseph M.
Robertson and Frank G. Thomp-
son, as and constituting the De-
partment of Treasury of the
State of Indiana,

Defendants.

Civil Cause
No. 117.

NOTICE OF APPEAL.

Notice is hereby given that Ford Motor Company, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from the final judgment of the Court in this cause to the effect that plaintiff take nothing in the action, which judgment was entered on June 30, 1943.

/s/ Ross, McCord, Ice & Miller,

/s/ Jas. A. Ross,

*Attorneys for Plaintiff-Appellant,
Ford Motor Company.*

951 Consolidated Building,
Indianapolis, Indiana.

State of Indiana, }
County of Marion. } ss.

James A. Ross, being first duly sworn, upon his oath deposes and says that he is one of the Attorneys for Plaintiff-Appellant, Ford Motor Company; that on the 1st day of September, 1943 he mailed to the Attorneys for all of the Defendants-Appellees a copy of the foregoing Notice of Appeal.

And further affiant saith not.

/s/ Jas. A. Ross.

Subscribed and sworn to before me this 1st day of September, 1943.

(Seal) /s/ Wilma Pendergast,
Notary Public.

My Commission Expires: Jan. 19, 1946.

116 (Entry for September 1, 1943, continued.)

The plaintiff also files statement of points, which is as follows:

117 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—117) * *

STATEMENT OF POINTS.

(Filed Sept. 1, 1943.)

Plaintiff-appellant, pursuant to Rule 75(d) of the Rules of Civil Procedure for District Courts of the United States now makes this concise statement of the points on which plaintiff-appellant intends to rely on the appeal.

Plaintiff, as appellant on appeal, will rely upon the following points as supporting its contention that the Court committed error in its conclusions of law and in the entry of judgment on June 30, 1943 against plaintiff-appellant denying the plaintiff-appellant recovery as sought in the complaint, as amended, and the supplement thereto.

Point One. Plaintiff-appellant should have recovered the sums sought in paragraph 5(a) of the complaint, as amended, since such receipts were derived from activities, businesses and sources outside of the State of Indiana

under the provisions of Section 2 of the "Gross Income Tax Act of 1933" and as amended in 1937,* and were therefore not taxed under the Act.

Point Two. Plaintiff-appellant should have recovered the sums sought in paragraph 5(a) of the complaint, as amended, since such receipts were derived from activities, businesses and sources outside of the State of Indiana under the provision of Section 2 of the "Gross Income Tax Act of 1933" and as amended in 1937, and were therefore not taxed under the Act. The District Court in denying recovery on said ground failed to follow the binding construction of Section 2 of the "Gross Income Tax Act of 1933" by the Supreme Court of the State of Indiana, holding that such receipts were derived from activities, business and sources outside of the State of Indiana, and were therefore not taxable under the Act.

Point Three. Plaintiff-appellant should have recovered the sums sought in paragraph 5(a) of the complaint, as amended, since such receipts were derived from activities, businesses and sources outside of the State of Indiana under the provisions of Section 2 of the "Gross Income Tax Act of 1933" and as amended in 1937; and the imposition of a tax upon such receipts constitutes a denial to plaintiff-appellant of the due process of law, and such tax is illegal and void as being in conflict with the Fourteenth Amendment of the Constitution of the United States.

Point Four: Plaintiff-appellant should have recovered the sums sought in paragraph 5 (b) of the complaint, as amended, since such receipts were derived from activities, businesses and sources outside of the State of Indiana under the provisions of Section 2 of the "Gross Income Tax Act of 1933" and as amended in 1937, and were therefore not taxed under the Act.

Point Five. Plaintiff-appellant should have recovered the sums sought in paragraph 5(b) of the complaint, as amended, since such receipts were derived from activities, businesses and sources outside of the State of Indiana under the provisions of Section 2 of the "Gross Income Tax Act of 1933" and as amended in 1937, and were therefore not taxed under the Act. The District Court in denying recovery on said ground failed to follow the binding

* Ch. 50, Acts of Indiana 1933, amended by Ch. 117, Acts of Indiana 1937. Referred to herein as above indicated.)

construction of Section 2 of the "Gross Income Tax Act of 1933" by the Supreme Court of the State of Indiana, holding that such receipts were derived from activities, businesses and sources outside of the State of Indiana, and were therefore not taxable under the Act.

Point Six. Plaintiff-appellant should have recovered the sums sought in paragraph 5(b) of the complaint, as amended, since such receipts were derived from activities, businesses and sources outside of the State of Indiana under the provisions of Section 2 of the "Gross Income Tax Act of 1933" and as amended in 1937; and the imposition of a tax upon such receipts constitutes a denial to plaintiff-appellant of the due process of law, and such tax is illegal and void as being in conflict with the Fourteenth Amendment of the Constitution of the United States.

Point Seven. Plaintiff-appellant should have recovered the sums sought in paragraph 5(a) of the complaint, as amended, for the reason that the sums represent a tax imposed upon receipts derived from business conducted in commerce between the State of Indiana and other States of the United States, which, under the terms and provisions of Section 6(a) of the "Gross Income Tax Act of 1933" is exempt from taxation.

Point Eight. Plaintiff-appellant should have recovered the sums sought in paragraph 5(a) of the complaint, as amended, for the reason that the sums represent a tax imposed upon receipts derived from business conducted in commerce between the State of Indiana and other States of the United States, and if said receipts are not exempt under the provisions of Section 6(a) of the "Gross Income Tax Act of 1933", then said tax is invalid and void as to such receipts for the reason that the tax constitutes a regulation of and a burden upon commerce between the State of Indiana and other States of the United States in conflict with Article I, Section 8 of the Constitution of the United States.

Point Nine. Plaintiff-appellant should have recovered the sums sought in paragraph 5(b) of the complaint, as amended, for the reason that the sums represent a tax imposed upon receipts derived from business conducted in commerce between the State of Indiana and other States of the United States, which, under the terms and provisions of Section 6(a) of the "Gross Income Tax Act of 1933" is exempt from taxation.

Point Ten. Plaintiff-appellant should have recovered the sums sought in paragraph 5(b) of the complaint, as amended, for the reason that the sums represent a tax imposed upon receipts derived from business conducted in commerce between the State of Indiana and other States of the United States, and if said receipts are not exempt under the provisions of Section 6(a) of the "Gross Income Tax Act of 1933", then said tax is invalid and void as to such receipts for the reason that the tax constitutes a regulation of and a burden upon commerce between the State of Indiana and other States of the United States in conflict with Article I, Section 8 of the Constitution of the United States.

Point Eleven. Plaintiff-appellant should have recovered the sums sought in paragraph 5(d) of the complaint, as amended, since the sums therein referred to represent a tax upon receipt of gross income which accrued under the provisions of the "Gross Income Tax Act of 1933" prior to the effective date of the amendment of 1937 (April 1, 1937), and such assessment of the said tax was not made within two years from the time provided in Section 12(d) of said "Gross Income Tax Act of 1933".

Point Twelve. Plaintiff-appellant should have recovered the sums sought in the supplemental complaint since there arose between the plaintiff and defendant Department of Treasury an account stated for the sums referred to in said supplemental complaint.

/s/ Ross McCord Ice & Miller,

/s/ Jas. A. Ross,

*Attorneys for Plaintiff-Appellant
Ford Motor Company.*

121 951 Consolidated Building
Indianapolis, Indiana.

Service of copy of the foregoing statement of points upon defendants-appellees is acknowledged this 1st day of September, 1943.

/s/ John J. McShane,

/s/ Winslow Van Hornie,

Attorneys for Defendants-Appellees.

122 (Entry for September 1, 1943, continued.)

The plaintiff also files appeal bond in the sum of Two Hundred Fifty Dollars (\$250.00) with New Amsterdam Casualty Company as surety thereon, which bond is as follows:

123 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—117) * *

APPEAL BOND.

(Filed Sept. 1, 1943.)

Know All Men By These Presents, That we, Ford Motor Company, as Principal, and New Amsterdam Casualty Company, as Surety, are held and firmly bound unto Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Department of Treasury of the State of Indiana, as appellees, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to said appellees, their successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, severally by these presents.

Sealed with our seals and dated this 1st day of September, 1943.

Whereas, there was rendered at the May Term of the United States District Court for the Southern District of Indiana, Indianapolis Division, in a suit pending in said Court between Ford Motor Company, plaintiff, and Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Department of Treasury of the State of Indiana, defendants, a judgment against said plaintiff on the 30th day of June, 1943, and the said
124 plaintiff has duly filed a notice of an appeal from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit.

Now therefore, the condition of the above obligation is such that if the said Ford Motor Company shall prosecute this appeal to effect and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award with the judgment being modi-

Designation of Record.

fied, then the above obligation is to be void, otherwise to remain in full force and effect.

Ford Motor Company,

By /s/ Jas. A. Ross,
Attorney.

Countersigned By:

(Seal)

/s/ New Amsterdam Casualty Company,

(Corporate Seal)

/s/ by David Layton,
Attorney-in-Fact.

125 (Entry for September 1, 1943, continued.)

The plaintiff also files designation of contents of record on appeal, which designation is as follows:

126 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—117) • •

DESIGNATION OF CONTENTS OF RECORD ON
APPEAL.

(Filed Sept. 1, 1943.)

Plaintiff-appellant, pursuant to Rule 75(a) of the Rules of Civil Procedure for the District Courts of the United States, now designates the following portions of the record and proceedings in the above entitled cause which shall be contained in the Record on Appeal:

1. Bill of Complaint.
2. All appearances for defendants.
3. Answers of Defendants.
4. Amendment of and supplement to complaint.
5. Answer to amendment of complaint.
6. Answer to supplemental complaint.
7. Finding of Facts.
8. Conclusions of law.
9. Final judgment entered June 30, 1943.
10. All order book entries in said cause not enumerated herein.
11. Notice of appeal.

12. Appeal bond.
27 13. This designation of parts of the record.
14. Plaintiff's statement of points to be relied upon.
15. Clerk's Certificate to Transcript of Record.

/s/ Ross McCord Ice & Miller,

/s/ Jas. A. Ross,

*Attorneys for Plaintiff-Appellant,
Ford Motor Company.*

551 Consolidated Building,
Indianapolis, Indiana.

Receipt of service of a copy of the foregoing Designation of portions of the Record upon defendants-appellees is acknowledged this 1st day of September, 1943.

/c/ John J. McShane,

/s/ Winslow Van Horne,

Attorneys for Defendants-Appellees.

128 United States of America }
Southern District of Indiana }
Indianapolis Division }

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the record and proceedings in the cause of Ford Motor Company vs. Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Department of Treasury of the State of Indiana, No. 117 Civil, according to the Designation filed September 1, 1943, now remaining among the records of said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 18th day of September, 1943.

(Seal) Albert C. Sogemeier,
*Clerk, United States District Court
Southern District of Indiana.*

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, printed under my supervision and filed on the third day of November, 1943, in:

Cause No. 8417.

Ford Motor Company,
Plaintiff-Appellant,
vs.

Department of Treasury of the State of Indiana, etc.,
Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of April, A. D. 1944.

(Seal)

Kenneth J. Carrick
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the sixth day of October, in the year of our Lord one thousand nine hundred and forty-two, and of our Independence, the one hundred and sixty-seventh.

* Ford Motor Company, 8417 Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and Constituting the Department of Treasury of the State of Indiana, 8417 <i>Plaintiff-Appellant,</i> <i>vs.</i> <i>Defendants-Appellees.</i>	}	Appeal from the District Court of the United States for the Southern District of Indiana, In- dianapolis, Division.
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---	---------------------------------------------------------------------------------------------------------------------------------

And, to-wit: On the twenty-fifth day of September, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

Cause No. 8417.

Ford Motor Company,
Plaintiff-Appellant,

vs.

Department of Treasury of the State of Indiana, *et al.*, etc.,
Defendants-Appellees.

The Clerk will enter our appearance as counsel for Plaintiff-Appellant.

James A. Ross,
950 Consolidated Bldg.,
Indianapolis, Ind.
Robt. D. McCord,
950 Consolidated Bldg.,
Indianapolis, Ind.

Endorsed: Filed September 25, 1943. Kenneth J. Car-
rick, Clerk.

And on the same day, to-wit: On the twenty-fifth day of September, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellees, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8417. /

Ford Motor Company,
Plaintiff-Appellant.

vs.

Department of Treasury of the State of Indiana, *et al.*, etc.,
Defendants-Appellees.

The Clerk will enter our appearance as counsel for Defendants-Appellees.

Winslow Van Horne,
141 S. Meridian St.,
Indianapolis, Ind.

John J. McShane,
141 S. Meridian St.,
Indianapolis, Ind.

James A. Emmert,
State House,
Indianapolis, Indiana.

Endorsed: Filed September 25, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the eleventh day of January, 1944, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 11, 1944.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ford Motor Company,
Plaintiff-Appellant,

8417

vs.

Department of Treasury of the
State of Indiana, M. Clifford
Townsend, Joseph M. Robertson
and Frank G. Thompson, as and
Constituting the Department of
Treasury of the State of Indiana,
Defendants-Appellees.

Appeal from the District
Court of the United
States for the Southern
District of Indiana, In-
dianapolis, Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. James A. Ross, counsel for appellant, and by Mr. Winslow Van Horne and Mr. John J. McShane, Counsel for appellees, and the Court takes this matter under advisement.

And afterwards, to-wit: On the fourth day of March, 1944, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8417.

October Term, 1943, January Session, 1944.

FORD MOTOR COMPANY,
Plaintiff-Appellant,

vs.

**DEPARTMENT OF TREASURY OF THE
STATE OF INDIANA, M. CLIFFORD
TOWNSEND, JOSEPH M. ROBERT-
SON and FRANK G. THOMPSON, As
and Constituting the Department of
Treasury of the State of Indiana,
Defendants-Appellees.**Appeal from the District
Court of the United
States for the Southern
District of Indiana, In-
dianapolis Division.**March 4, 1944.**Before KERNER and MINTON, *Circuit Judges*, and LIN-
LEY, *District Judge*.

MINTON, *Circuit Judge*. Only one question is presented here: Whether the plaintiff-appellant, the Ford Motor Company, a non-resident of Indiana, must pay to the State of Indiana a tax on its gross income from a certain type of transaction designated in the record as "Class A sales." The years in question are 1935, 1936, and 1937.

The plaintiff paid the tax and brought suit in the District Court to recover against the defendants-appellees, the Department of Treasury of the State of Indiana and the officials constituting the Board of that Department. The District Court made findings of fact and stated its conclusions of law thereon in favor of the defendants. From a judgment in favor of the defendants, the plaintiff has appealed.

The plaintiff, as stated in its brief, relied solely upon errors arising out of the court's conclusions of law. The evidence is not before us. The record consists only of pleadings, findings of fact, which are unchallenged, and conclusions of law.

For a description of Class A sales, we look to Finding No. Ten:

"The major cause of the additional assessment asserted by the department was due to the imposition of a tax upon gross receipts by plaintiff from sales where cars, trucks or parts were shipped directly from the plaintiff's factory at Dearborn, or from plaintiff's assembly plants at Chicago, Cincinnati, and Louisville, to dealers in Indiana who were assigned to such branches, and (1) where such products were paid for by such Indiana dealers in cash upon the delivery thereof at such dealers' place of business in Indiana, such payments having been made by such dealers to the employees of the truck-away or convoy companies upon delivery, and (2) where such products were paid for by such Indiana dealers with finance papers, or a combination of finance papers, and cash, upon delivery thereof at the dealers' place of business in Indiana, such payments having been made by such dealers to the employees of the truck-away or convoy companies upon making such delivery, and in both instances the collections so received by the truck-away or convoy companies were by them taken and delivered in due course to the respective branches of the plaintiff aforesaid entitled to receive the same, were deposited by such branches in their regular depository as hereinbefore found, and were thereupon subject to the further order and disposition by the plaintiff as its property; these may be properly referred to as 'Class A' sales."

The District Court made further relevant findings concerning the nature of Class A sales in Finding No. Seventeen:

“ . . .

“(b) All of the gross receipts from the sale of cars, trucks and parts by plaintiff to dealers in Indiana, upon which the taxes and interest were assessed and collected as shown in Finding No. Sixteen,^[1] were received by plaintiff while it was engaged in business in Indiana, and derived from sources within Indiana, from the sale and transfer of plaintiff's property which was thus transported to its Indiana dealers as aforesaid,

1. Finding No. Sixteen covered Class A sales and another class not involved here.

and paid for by such Indiana dealers in cash upon arrival at their places of business in Indiana, or were paid for upon arrival at the place of business of such dealers in Indiana with finance papers executed as aforesaid, or a combination of cash and finance papers, collection having been made in both instances by the employees of said truck-away or convoy companies acting as the agent for the plaintiff in the making of such collections, and who, thereafter, in due course transmitted such receipts and collections to the respective branches of plaintiff entitled to receive the same."

From these findings, it is clear that Class A sales were sales of merchandise manufactured and assembled outside of Indiana but that every transaction in the sales, with the exception of the shipment of the goods and the receipt of some orders, took place in Indiana.

As the Gross Income Tax Law of Indiana was originally enacted in 1933, Chapter 50, Acts of 1933, Burns Indiana Revised Statutes Annotated (1933) § 64-2602, it provided:

"Sec. 2. . . . Such tax shall be levied upon the entire gross income of all residents of the state of Indiana, and upon the gross income derived from sources within the state of Indiana, of all persons and/or companies, including banks, who are not residents of the state of Indiana, but are engaged in business in this state or who derive gross income from sources within this state"

This statute was limited by the holding of the Supreme Court in *J. D. Adams Manufacturing Company v. Storen*, 304 U. S. 307, 58 S. Ct. 913, 83 L. Ed. 1365, so as to exclude from its scope sales made outside the State by a domestic corporation of Indiana, although the goods were manufactured in Indiana and shipped therefrom. In accordance with this holding, the Gross Income Tax Law was amended in 1937, Chapter 117, Acts of 1937, Burns Indiana Revised Statutes Annotated (1943) § 64-2602, to read:

"Sec. 2. . . . Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana"

It is conceded by the plaintiff, however, that this amendment does not help its case. It is quite apparent that the District Court intended to find and did find the facts which brought Class A sales squarely within both the provisions of the Act of 1933 and the amended provision of 1937.

The plaintiff relies upon *Department of Treasury v. International Harvester Co.*, 47 N. E. 2d 150, 152. In that case, the Indiana Supreme Court said:

"• • • Under Class A the orders upon which the goods were sold were accepted outside the confines of Indiana, and payment was made to branches in other states. There was no showing of a tax evasion. We cannot say that income so received by the appellees was 'derived from sources within the state of Indiana.'"

Thus it will be seen that in that case the articles were accepted and paid for outside of Indiana, while in the case at bar they were accepted and paid for in Indiana. In one case, we have a sale within Indiana, which is covered by the statute, and in the other, a sale without Indiana not covered by the statute.

The plaintiff also insists that the tax in the case at bar is a burden upon interstate commerce and therefore invalid, citing *J. D. Adams Manufacturing Co. v. Storen*, *supra*. In that case, as we have said, the State of Indiana sought to tax the gross receipts of a domestic corporation which were derived from the sale of goods manufactured within the State but sold outside the State. The Supreme Court held that the tax was a burden upon interstate commerce and invalid. That is not the case we have before us. Since the gross income here involved was derived from sales in which all transactions except the placing of some orders and the shipment of the goods took place in Indiana, the sales occurred in Indiana and such transactions were so isolated in and identified with Indiana that the possibility of multiple taxation of such sales was eliminated. That being so, the fact that the merchandise arrived in Indiana in interstate commerce is immaterial. *Department of Treasury v. Allied Mills*, 220 Ind. 340, 42 N. E. 2d 34; *J. D. Adams Manufacturing Co. v. Storen*, *supra*; *Department of Treasury of Indiana v. Wood Preserving Corp.*, 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188; *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 57, 60 S. Ct. 388, 84 L. Ed. 565.

It is not controlling that the gross income taxed is de-

rived from the sale of goods that arrive in the State in interstate commerce. If the tax does not burden interstate commerce, it is not invalid, and it does not burden interstate commerce when the gross receipts are derived from sales that took place within the taxing state. That is this case.

The plaintiff had made its claim for refund with the Gross Income Tax Division of the Department of Treasury of Indiana. The Division had within it one designated as hearing judge, who rendered to the Division opinions on applications for refund. In the case at bar, the hearing judge first ruled the refund was not proper. Later he ruled that it was proper and that refund should be made, and the plaintiff was so advised. However, the hearing judge's later ruling was not approved by the Department, and the case in the District Court proceeded to trial. The plaintiff amended its pleadings and alleged that the ruling of the hearing judge and its communication to the plaintiff amounted to an account stated.

As to this, the District Court found:

"Finding No. Fifteen.

"At no time did defendant or any of its attorneys, agents or employees promise plaintiff that the sum of \$78,514.10, or any other specifically stated amount would be refunded to plaintiff. No certificate of over-assessment was issued to plaintiff by defendant at any time."

In order to have an account stated, the party who states the account must be authorized to do so, and the account stated must be for a definite, certain amount. *American Jurisprudence*, Vol. 1, Accounts and Accounting, §§ 23-24. There is no finding in the case at bar that the so-called hearing judge in the Gross Income Tax Division was authorized to bind the State of Indiana or that his ruling was final. Evidently it was not final, as it was not followed by the Department. We have found no authority in the statutes of Indiana that statements of such a hearing judge bind the State of Indiana. It follows, therefore, that no one who was authorized to do so stated an account and that furthermore the alleged account stated was not found to be for any specific amount. Therefore, the State of Indiana is not liable on the theory of an account stated.

The judgment is

AFFIRMED.

LINDLEY, D. J., Dissenting:

I am sorry to say that after mature consideration, I find it impossible to distinguish the facts here from those in *Department of Treasury v. International Harvester Company*, 47 N. E. (2d) 150 (Ind.). In view of that decision, I think the judgment should be reversed.

Endorsed: Filed March 4, 1944. Kenneth J. Carrick, Clerk.

* And on the same day, to-wit: On the fourth day of March, 1944, the following further proceedings were had and entered of record, to-wit:

Saturday, March 4, 1944.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ford Motor Company,
Plaintiff-Appellant,
8417 *vs.*

Department of Treasury of the
State of Indiana, M. Clifford
Townsend, Joseph M. Robertson
and Frank G. Thompson, as and
Constituting the Department of
Treasury of the State of Indiana,
Defendants-Appellees.

Appeal from the District
Court of the United
States for the Southern
District of Indiana, In-
dianapolis, Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in

this cause appealed from be, and the same is hereby, affirmed, with costs.

And afterwards, to-wit: On the twenty-seventh day of March, 1944, the Mandate of this Court issued to the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed, excepting briefs of counsel and motions and orders extending time for filing briefs, in:

Cause No. 8417.

Ford Motor Company,
Plaintiff-Appellant,
vs.

Department of Treasury of the State of Indiana, etc.,
Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of April, A. D. 1944.

(Seal)

Kenneth J. Carrick
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
MAY 3 1944
CHARLES ELWINE CROPLEY

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.  75

FORD MOTOR COMPANY,
Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. Clifford Townsend, Joseph M. Robertson,
and Frank G. Thompson, as and Constituting the Depart-
ment of Treasury of the State of Indiana,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF
IN SUPPORT THEREOF**

MERLE H. MILLER,
Counsel for Petitioner,
951 Consolidated Bldg.,
Indianapolis, Ind.

JAMES A. ROSS,
Of Counsel.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. _____

FORD MOTOR COMPANY,
Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. Clifford Townsend, Joseph M. Robertson,
and Frank G. Thompson, *as* and Constituting the Depart-
ment of Treasury of the State of Indiana,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

The petitioner, Ford Motor Company, prays that a writ
of certiorari issue to review the judgment of the United
States Circuit Court of Appeals for the Seventh Circuit

entered in the above entitled cause on March 4, 1944, affirming a decision of the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

OPINION BELOW

The opinion of the Circuit Court of Appeals is reported in *Ford Motor Company v. Department of Treasury of the State of Indiana*, — Fed. (2nd) —, also in the record here at page 98.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 4, 1944. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U. S. C. A. Sec. 347.

QUESTIONS INVOLVED

1. Whether the "source" of petitioner's gross income for the years 1935, 1936 and 1937 from "Class A" sales was "within the State of Indiana" so as to be taxable under the Indiana Gross Income Tax Act of 1933 and under the Act as amended in 1937, as construed by the Supreme Court of the State of Indiana in the case of *Department of Treasury v. International Harvester Company* (1943), — Ind. —, 47 N. E. (2nd) 150, the District Court having found that the orders for the goods involved were received and accepted by petitioner outside the State of Indiana, the goods manufactured outside the State of Indiana, deliveries made to the purchaser or purchaser's agent outside the state and the purchase price paid, either to the seller outside the State of Indiana or to an independent

carrier within the state for transmittal to the seller outside the state.

2. Whether an account stated arose between the respondent and petitioner where the respondent upon a hearing duly held before a hearing judge, authorized to bind the Department of Treasury, determined that petitioner was entitled to a refund of the tax assessed and paid on the transaction outlined (Class A sales), and where respondent, by its answer to petitioner's complaint for such refund, admitted authenticity of the determination so made, and where, although the amount of the award for the refund was not stated in dollars and cents, but was not in dispute, and subsequent to award was stipulated by the parties to be the amount assessed and paid by petitioner, *i. e.*, Seventy-eight Thousand Five Hundred Fourteen Dollars and Ten Cents (\$78,514.10):

STATEMENT

This was an action commenced in the United States District Court for the Southern District of Indiana, Indianapolis Division, by the petitioner against the respondent, to recover taxes assessed against and paid by the petitioner for the years 1935, 1936 and 1937, under the Indiana Gross Income Tax Act of 1933 and under the same act as amended in 1937. The tax assessed, and for which recovery was sought, related to two classes of sales, referred to in the findings and in the proceedings as Class A sales and Class B sales. Class B sales related to transactions which involved petitioner's branch in the State of Indiana. A refund on this class of sales is not claimed in this petition. The "Class A sales" involve transactions considered by the petitioner to be wholly outside the State of Indiana,

and are transactions made and concluded by petitioner's branches at a situs outside the State of Indiana, and on this phase of the controversy petitioner clings to its claim for a refund of the amount, including interest, actually assessed and paid on this particular class of sales, to-wit, the sum of \$78,514.10 (R. 77). The District Court denied petitioner relief, and on appeal to the Circuit Court of Appeals the judgment of the District Court was affirmed (*Ford Motor Co. v. Dept. of Treasury of the State of Indiana*, — Fed. (2d) —), also see record here page 98.

The facts as found by the District Court, relating to the class of transactions here involved, may be summarized as follows:

Source of Income

Plaintiff was a corporation foreign to the State of Indiana (R. 41). All of its products were manufactured outside the State of Indiana (R. 42) and sold by its branches located outside the State of Indiana to independent dealers located within the State of Indiana. These independent dealers sold to the ultimate consumer (R. 43). All of petitioner's dealers in Indiana involved in "Class A sales" were assigned to and allocated to various branches located in Louisville, Kentucky, Chicago, Illinois and Cincinnati, Ohio (R. 42).

Orders for petitioner's products were forwarded by the dealers to and received by petitioner's branches outside the State of Indiana (R. 49, 50). The products were manufactured to the specification of the dealer's order (R. 52) by petitioner's assembly plants whose situs were likewise outside the State of Indiana (R. 78). Due to the importance of the finding with regard to the actual de-

livery of the products to the dealer, we quote the finding which specifically relates to that subject. After finding the facts relating to the manufacture of the products ordered by the dealer, the District Court specifically found:

“(f) The car then rolls off of the end of the line to the door of the assembly building where it is filled with gas and oil, and then is driven out of the plant by an employee of the plaintiff, and on the grounds of the plaintiff receives a short road test and a final check. It is then brought to the gate of the assembly branch and at that gate a representative of the independent truck-away company, or the dealer himself who is to receive the car checks the car with the car checker of the plaintiff. If the car is found to match the invoice, the checker of the plaintiff at gate signs the invoice on the line marked ‘Initials of Car Checker.’ The dealer or the independent truck-away company as agent of the dealer signs the invoice on the line marked ‘Signature of Dealer (indicating receipt),’ and dates his signature with the date that the car leaves the gate. The dealer, or the dealer’s representative of the truck-away company, then gets into the car and drives it off of the plaintiff’s property.

“(h) It has been a custom of long standing for the employees of the truck-away company to sign for the dealers as their agent. All dealers know of the practice, and have acquiesced fully in it.” (R. 52.)

The truck-away or convoy company referred to was not owned by the petitioner but was an independent carrier (R. 56), and the risk of loss after the products left the gate of petitioner’s assembly plant was on the carrier (R. 56).

The price for the products involved was either (1) paid in full before they left the gate of the assembly plant; (2) paid in whole or in part by finance papers executed before the products left the gate, by the dealer or a representative of the truck-away company who was authorized by written power of attorney to execute such papers by the dealer; or (3) by payment in cash to the truck-away company at dealer's place of business or by finance papers executed by the truck-away company as agent for the dealer after the products left the branch. No products except parts were sold on open account (R. 53). Although the price was not always paid in full before the car or truck, or other products, left the gate of the assembly plant.

"plaintiff looks to the truck-away company for payment in full." (R. 56.)

Under the contract between the petitioner and its said dealers, title to its products was reserved until the price was paid

"but regardless of title remaining in the Company or having passed to Dealer, all shipments shall be at Dealer's risk from the time of delivery to carrier at place of shipment." (R. 45.)

"The collections so received by the truck-away or convoy companies were by them taken and delivered in due course to the respective branches of the plaintiff aforesaid entitled to receive the same, were deposited by such branches in their regular depository as hereinbefore found, and were thereupon subject to the further order and disposition by the plaintiff as its property." (R. 64.)

Petitioner, in the first instance, paid the truck-away company's transportation charges, but under its contract

with the dealers was reimbursed for freight charge from Dearborn on separate items set up on the invoice to cover the charge (R. 56).

In a few instances after invoices were made out to the dealer, and either before or after the car left the assembly plant gate, the car was re-allocated to another dealer on advice of a branch (R. 57-59).

Intermingled with the District Court's findings of fact are certain conclusions which are wholly repugnant to the specific facts otherwise found and heretofore recited, namely:

"All of the gross receipts . . . upon which the taxes and interest were assessed and collected . . . were received by plaintiff while it was engaged in business in Indiana, and derived from sources within Indiana. . . ." (R. 79-80.)

And, further that in making collections the truck-away or convoy company was acting as the agent for the petitioner. (R. 80.)

The United States Circuit Court of Appeals, by its opinion and judgment held:

"From these findings, it is clear that Class A sales were sales of merchandise manufactured and assembled outside of Indiana but that every transaction in the sale, with the exception of the shipment of the goods and the receipt of some orders, took place in Indiana."

The Account Stated

During the pendency of this action petitioner, at the invitation of respondent, requested a rehearing on its claim for refund (R. 68-69). The claim was reviewed by the re-

spondent on its merits, and on March 1, 1941, the hearing judge of the Department, who had authority and power to bind the Department (R. 39-40), by written opinion determined that:

"The Department will accordingly take the necessary steps to make refund of the gross income tax paid on the transaction outlined above." (R. 75.)

The transactions outlined in the opinion are described by the "hearing judge" in these words:

"These Indiana customers are for the most part retail automobile dealers. The Ford Motor Car Company will make delivery of such automobiles to the Indiana customers or to their authorized agents at the delivery gate of its out-of-State manufacturing plant or assembly plant. Deliveries of the products desired by Indiana customers are made under conditions whereby the Ford Motor Car Company, at the time of the delivery to the customers or the customers' authorized representatives, will be paid for the products, or appropriate financing will be arranged for by the customers or by their authorized agents.

"It is further disclosed that the Ford Motor Car Company in regard to sales made to Indiana customers resident within the territorial jurisdiction of the outside manufacturing and assembling plants does not have the obligation or the responsibility, under the terms of the sale, to make delivery of the products desired by Indiana customers to those customers across State lines, nor does any obligation or responsibility to initiate such transportation across State lines exist. It is indicated that the entire responsibility of the Ford Motor Car Company to the customer ceases at the time of delivery of the products to the Indiana customers or to their

authorized representatives at the delivery gate of the manufacturing or assembling plants outside of the State of Indiana.

"It is, therefore, indicated that such a transaction is completed at a business situs entirely outside of the State of Indiana, and that such a transaction is not a transaction made in interstate commerce, and that the question of facilities is not existent in this transaction." (R. 74-75.)

The amount of the award was not stated in the opinion, but the District Court found, as to "Class A" transactions, that, before the determination of the hearing judge aforesaid, counsel for both the petitioner and respondent, as well as the hearing judge, agreed:

"that the \$78,000 part of the claim had been audited and those figures agreed upon at the time it was paid." (R. 71.)

Respondent, by answer filed in this cause before the determination of the hearing judge aforesaid, admitted that the amount assessed and paid (including interest) on account of

"gross receipts from the sale of cars, trucks, and parts to dealers located within the State of Indiana where such payments or gross receipts and business was allocated by the plaintiff to its Chicago, Illinois, or Cincinnati, Ohio, or Louisville, Kentucky, branches"

(Class A sales), was the sum of \$78,514.10. (R. 21.) Later, on December 1, 1941, for the purposes of the trial, the parties stipulated that the amount paid on account of those sales was \$78,514.10. The Court further found:

"This item of \$78,514.10 was known and referred to by the parties in some of their discussions as the

\$78,000.00 claim, and was thus distinguished from the claim of \$37,259.24, which was known and sometimes referred to by them as the \$37,000 claim." (R. 66.)

The amount of the claim was not at any time in dispute, and could not be more or less than the amount actually assessed and paid. The determination was never rescinded or withdrawn by respondents (R. 76).

Petitioner later, and during the course of the proceedings in the District Court, filed a supplemental complaint seeking recovery on the theory of an account stated.

Opposed to the foregoing specific facts found or admitted are other statements which are included in the findings of fact as follows:

"Defendant did not know what plaintiff's gross income from such transactions was when said order was issued. . . ." (R. 77.)

"At no time did defendant or any of its attorneys, agents or employees promise plaintiff that the sum of \$78,514.10, or any other specifically stated amount would be refunded to plaintiff. No certificate of over-assessment was issued to plaintiff by defendant at any time." (R. 77.)

The United States Court of Appeals in this cause further held:

"... the alleged account stated was not found to be for any specific amount."

The determination made by the hearing judge was binding on the Department. In this respect the District Court found:

"Elmer F. Marchino is the Hearing Judge of the Gross Income Tax Division of the Department of Treasury, and has been such continuously since May, 1933. As such, he hears and determines objections to proposed additional assessments of Gross Income Tax and petitions for the refund of Gross Income Tax. He has the power and authority to determine the facts involved on any notice of proposed assessment of additional tax or petition for refund of tax, and the right to determine, from a legal status, the policy of the Department." (R. 41-42.)

The respondent's answer admitted:

"The defendants admit that thereafter, and on March 1, 1941, the defendant Department of Treasury acquiesced in the plaintiff's petition for reconsideration of its ruling, and issued a second letter of finding, dated March 1, 1941, which read as follows: . . ." (R. 36.)

(Then follows a copy of the letter relied upon in petitioner's supplemental complaint and referred to in the findings. (R. 36.))

Respondent further admitted by its answer:

"The defendants further answering paragraph '4' admit that on or about March 1, 1941, the defendants mailed the letter of findings reproduced above to the plaintiff." (R. 38.)

Notwithstanding the foregoing specific findings of the trial court and the admissions of Respondent's answer, the Court of Appeals held:

" . . . the hearing judge's later ruling was not approved by the department. . . . No one, who was authorized to do so stated an account. . . ."

REASONS FOR GRANTING WRIT

1. In ruling that, under the facts found by the District Court, the source of income involved under Class A sales was in Indiana, the Circuit Court of Appeals decided an important question of local law probably in conflict with an applicable decision of the Supreme Court of Indiana, namely, *Department of Treasury v. International Harvester Company* (1943), 47 N. E. (2nd) 150.

2. In ruling that, under the facts found by the District Court no account stated arose between the parties, the Circuit Court of Appeals decided an important question of local law probably in conflict with applicable local decisions.

3. The decision of the Circuit Court of Appeals as to the account stated sued on, by holding that no account stated arose between the parties, is an erroneous decision of an important question of general law, is probably untenable and is in conflict with the weight of authority and the decisions of this Court.

4. In disregarding the specific facts found by the District Court and basing its opinion upon erroneous conclusions of law intermingled with the facts, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

SPECIFICATIONS OF ERROR TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the "source" of petitioner's gross income from "Class A sales" was within the State of Indiana.

2. In holding that petitioner's gross income from sales made by it on orders received and accepted, goods manufactured and deliveries made to its dealers and their carrier agents, all done at a situs outside the State of Indiana, was subject to the imposition of the tax laid by Section 2 of the Gross Income Tax Law of the State of Indiana enacted in 1933, Burns' Indiana Revised Statutes (1933), Sec. 64-2602, and amendment thereto of 1937, Burns' Indiana Revised Statutes (1943), Sec. 64-2602, contrary to the local applicable decision of *Department of Treasury v. International Harvester Co.* (1943), 47 N. E. (2d) 150.

3. In holding that no account stated arose between petitioner and respondent as to "Class A sales," where the amount was not in dispute and respondent, upon a hearing upon the merits of the claim, made and issued to petitioner an order for the refund of the taxes involved.

4. In disregarding the specific facts found by the District Court and basing its decision solely upon conclusions of law of the District Court intermingled with findings of fact, which are inconsistent with and repugnant to the specific facts found.

CONCLUSION

WHEREFORE your petitioner respectfully prays that this petition be granted and that a writ of certiorari be issued directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding that Court to

certify and send to this Court for its review and determination a full and complete transcript of the record and proceedings in the cause numbered and entitled "No. 8417, Ford Motor Company, Plaintiff-Appellant v. Department of Treasury of the State of Indiana, et al., Defendants-Appellees."

MERLE H. MILLER,
Counsel for Petitioner.

JAMES A. ROSS,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. _____

FORD MOTOR COMPANY,

*Petitioner,**v.*DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. Clifford Townsend, Joseph M. Robertson,
and Frank G. Thompson, as and Constituting the Department of Treasury of the State of Indiana,*Respondents.***BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI****THE OPINION OF THE COURT BELOW**

The opinion of the Circuit Court of Appeals below was rendered on March 4, 1944, and is reported at — Fed. (2d) —; it is also reproduced in the Record at pages 98 to 103.

JURISDICTION

Jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by Act of February 13, 1925, 43 Stats. 928, 28 U. S. C. A. Sec. 347.

STATEMENT OF THE CASE

The Court is respectfully referred to the Statement of the Case under the heading "Statement" in the foregoing petition for writ of certiorari (*supra* pages 3 to 11).

SPECIFICATION OF ERRORS

Reference is here made to the specification of errors contained in the petition for certiorari, page 13 *supra*, for the specifications of error to be urged, and request is made that the same be treated as here written without repetition.

SUMMARY OF ARGUMENT

Source of Income

The decision and opinion below is in conflict with the decision of the Indiana Supreme Court in the case of *Department of Treasury v. International Harvester Co.* (1943), 47 N. E. (2nd) 150.¹ This is true in spite of the attempt in the majority opinion to distinguish the present case from the facts exhibited in the International Harvester case.

The dissenting judge below found "it impossible to distinguish the facts here from these in the case of *Depart-*

¹ *Department of Treasury v. International Harvester Co.*, is before this Court on appeal, No. 355, on questions other than sales of the character of "Class A Sales", there and here involved.

ment of Treasury v. International Harvester Co. . . ." and petitioner submits that a candid comparison of the two decisions will serve better than anything else to demonstrate the correctness of the quoted statement of the dissenting judge.

The act in question provides for a tax "upon the gross income ~~derived from sources within the State of~~ Indiana . . ." ² of persons or companies not residents of the State of Indiana. The Supreme Court of the State of Indiana, in the case of *Department of Treasury v. International Harvester Co., supra*, construing this statute, held that it must be construed more strongly against the state and can not be extended by implication beyond the clear import of the language used, so as to embrace transactions not 'specifically pointed out, and therefore transactions occurring outside the state, which constitute "the source" of the income, are not taxable, even though some activity relating to such transaction occurs within the State of Indiana, because "we can not say that the income so received was 'derived from sources within the State of Indiana.' "

In the case at bar the majority opinion relies upon a specific finding of fact set forth on the face of the opinion. (Finding No. 10.) An examination of that finding discloses that the only activity which took place in the State of Indiana was the activity of an independent carrier in transporting the goods from without the state to the dealer within the state and carrying the price back to the petitioner at a point outside the state. These are the facts upon which the court below held the tax valid, yet peti-

² Pertinent statutes and Regulations are set forth in Appendix, *infra*, p. 28.

tioner's activities in delivering the goods to the carrier and in receiving the price was entirely outside the state. Under the decision of the state court referred to, this is not a taxable transaction under the Indiana Gross Income Tax law, yet on these facts the court below affirmed the validity of the tax and denied recovery. This situation is "inadmissible" under the decision of this Court in *Erie Railroad v. Tompkins* (1938), 304 U. S. 64, and subsequent decisions.

Petitioner challenges the decision below as a departure from the accepted and usual course of judicial procedure in this—it is believed that the findings of fact of the District Court were binding upon the Circuit Court of Appeals as well as upon the parties, and that the Court was not at liberty to disregard the facts found by the District Court that the goods here involved were delivered to "the dealer or dealer's representative . . ." outside the state (R. 52), and that the orders for the goods were "forwarded by the dealer to the branch of the company to which the dealer is assigned" (R. 50). These facts were clearly and unequivocally found, and emphasize the transactions as clearly not taxable under the applicable decision of the Supreme Court of Indiana.

Account Stated

The decision of the court below on this phase of the case turned, first, on the authority of the "hearing judge" to make a binding order, and, second, on whether the amount of the award must of necessity be stated in the award as some definite and certain amount. On the first point, the court below is believed by petitioner to have gone outside the record to make a determination to the effect that the

"hearing judge" had no authority to make the order. The findings of fact by the District Court (R. 41) clearly state "He has the power and authority to determine the facts involved on any . . . petition for refund of taxes and the right to determine, from the legal status, the policy of the Department." Furthermore, respondent's answer admits that the order made by this "hearing judge" was issued and delivered to the defendant by the Department of Treasury (R. 36). Thus, when the court below determined that "the hearing judge's later ruling was not approved by the Department," it went beyond the issues and clearly outside the record before it. Here again it is believed by respondent that a departure from the accepted and usual course of judicial procedure is demonstrated.

As to the second point, the court below determined that "the alleged account stated was not found to be for a specific amount." Therefore it was determined that there was no liability on the theory of an account stated. To make this determination the court below must have been obliged to disregard the District Court's finding of fact, namely, "that the Seventy-eight Thousand Dollar part of the claim had been audited and those figures agreed on at the time it was paid." (R. 71.) Since the amount was not in dispute, and since it could neither be more nor less than the amount assessed and actually paid on this class of sales, the designation in the award of the specific amount was not necessary to constitute an account stated, under the weight of authority and the decisions of this Court as hereinafter cited and set forth. The decision of the court below, therefore, is untenable and in conflict with the weight of authority and the decisions of this Court.

ARGUMENT

Source of Income

It is to be regretted that the majority opinion below did not disclose the clear fact found by the District Court to the effect that the orders for the goods were transmitted by the dealer to the petitioner and were received by the petitioner outside the State of Indiana (R. 49, 50), nor the further fact that the goods were delivered to the dealer or the dealer's agent outside the State (R. 52). Had these facts been disclosed on the face of the opinion, the Court would have been obliged to write that every transaction involving the sale and delivery of the products here involved occurred outside the State of Indiana. Instead of doing this, the Court wrote "From these findings it is clear that Class A sales were sales of merchandise manufactured and assembled outside of Indiana but every transaction in the sales, with the exception of the shipment of the goods and the receipt of some orders, took place in Indiana."³ Also, if it had appeared on the face of the opinion, as actually found by the District Court, that petitioner "looked to the truck-away company for payment in full" (R. 56) it would have been impossible to assert any activity whatever on the part of petitioner in the State of Indiana. But, in spite of the absence of these very material facts from the opinion, sufficient facts do appear to illustrate its conflict with the International Harvester case.

The following are the only facts which are given by the Court to support its opinion and are to be found in Finding No. 10 of the District Court, quoted in the opinion,

³ All orders, not "some", were forwarded to outside branches. (R. 50.)

viz., the goods were manufactured outside the state; shipped from outside the state by means of a carrier to dealers within the state; the price was paid to the carriers and "by them taken and delivered in due course to the respective branches of plaintiff aforesaid entitled to receive the same . . . and were thereupon subject to the further order and disposition by plaintiff as its property." Thus, the only activity which is shown on the face of the opinion to have occurred in Indiana *was the activity of the carrier* in carrying the goods to the dealer and in receiving the price from the dealer and carrying it back to the petitioner outside the state. Under the decision in the International Harvester case such an activity does not constitute *the source* of the income and such an activity is not pointed out or embraced by the tax statutes here involved. Yet, under the decision of the Court of Appeals in this case, the transaction of the carrier, in collecting the price and transmitting it to the petitioner, is made "the source" of petitioner's income and therefore taxable under the statute. Under this construction of the statute, anyone who ships goods C. O. D. into Indiana by carrier is liable for the gross income tax under the statute in question, on the ground that the receipt of the price by the carrier is the source of the shipper's income. Nothing could be more untenable than such a construction. Such a construction would make the act vulnerable to attack on the ground that it violates the Due Process Clause of the Fourteenth Amendment of the Federal Constitution. In the International Harvester case it does not appear, at least on the face of the opinion, how the purchase money was paid to the manufacturer—whether it was collected by a carrier or transmitted by mail. However, it could make no difference which method was employed. The price was received

by the manufacturer outside the state in either case. It should be further noted that in the Harvester case orders were solicited in Indiana by representatives of the out-of-state branches; still this did not have the effect of fixing the source of the income as being in the State of Indiana, for, said the court:

"The appellants would have us construe the statute as exempting only income derived entirely from activities outside of Indiana. This would distort the clear import of the language employed and violate the rule stated above. Under Class A the orders upon which the goods were sold were accepted outside the confines of Indiana, and payment was made to branches in other states. There was no showing of a tax evasion. We cannot say that income so received by the appellees was derived from sources within the state of Indiana."

To demonstrate that the case at bar is actually a stronger case for the taxpayer than was the International Harvester case, we set forth the description of the transaction held exempt by the Indiana Supreme Court as set forth in its opinion:

"Class A: Sales by branches located outside Indiana to dealers and users located in Indiana. These sales were made on orders solicited in Indiana by representatives of out-of-state branches, or upon mail orders sent from Indiana to out-of-state branches. The orders were accepted by the outside state branch offices and the purchase money paid to them. Without directions from the purchasers, the goods were shipped to them in Indiana from branches, warehouses, or factories located outside Indiana."

Again, referring solely to the facts set forth on the face of the opinion and disregarding the actual facts found by

the District Court and omitted from the opinion, it is clear as a legal proposition that when the goods were delivered to the carrier outside the State, as recited in Finding No. 10, title to the goods passed to the dealer, notwithstanding that they were shipped C. O. D., or notwithstanding that the carrier was to collect the price. Petitioner's interest was merely a security interest.

United States v. Andrews (1907), 207 U. S. 229;

46 Am. Jur. page 611, and authorities collected;

Sec. 19, Uniform Sales Act;

Sec. 22, Par. (a), Uniform Sales Act;

Sec. 20, Par. (2), Uniform Sales Act;

Jones v. United States (1909), (C. C. 4), 170 Fed 1;

Savannah Chemical Co. v. Grace & Co. (1923),
293 Fed. 145;

Maffei v. Ginocchio (1921), 299 Ill. 254, 132 N. E.
518;

The Pennsylvania Co. v. Poor (1885), 103 Fed. 553.

In view, therefore, of the passing of title at a situs outside the State of Indiana, under the facts set forth in the opinion, there is nothing left upon which to base the determination that the "source" of petitioner's income was within the State of Indiana.

Compania General De Tabacos De Filipinas v. Collector of Internal Revenue (1929), 279 U. S. 386;

Comr. v. East Coast Oil Co., S. A., 85 Fed. (2nd) 322, (C. C. A. 5th 1936), Cert. Den. 299 U. S. 608.

Petitioner is not unmindful of the further finding by the District Court set forth on the face of the opinion below to the effect that the gross receipts "were received by plaintiff while it was engaged in business in Indiana and derived from sources within Indiana" but confidently asserts that this finding is an erroneous conclusion of law and does not overcome specific facts which, as a matter of law, impel a contrary conclusion.

United States v. Jefferson Electric Manufacturing Company (1933), 291 U. S. 386, 407;

Pike Rapids Power Company v. Minneapolis, etc. Company, 99 Fed. (2d) 902, Cert. Den. 305 U. S. 660;

Utter v. Eckerson (C. C. A. 9th 1935), 78 Fed. (2d) 307, 308.

There is also another finding relied upon by the Court of Appeals to the effect that the carrier, in making the collection of the price, did so as the agent of the petitioner. In view of the specific findings by the District Court that petitioner "looked to the truck-away company for payment in full" (R. 56) and "risk of loss was on the truck-away company" (R. 56) this statement in the finding would also appear to be an erroneous conclusion, contrary to the specific facts found, but, regardless of the character of the statement, whether a conclusion of law or an ultimate fact, the collection of the price by a carrier, as hereinbefore pointed out, can not correctly be said to be the "source" of petitioner's income under the statute as construed by the Indiana Supreme Court.

Therefore, petitioner insists that these conclusions, intermingled with the findings of fact, do not serve to dis-

tinguish the present case from the International Harvester case.

Petitioner respectfully submits that it has presented to this Court an instance of a judicial determination of public importance where the Federal Court has in fact not seen its way clear to follow the decision of the Supreme Court of Indiana in the construction of a local statute. Wholly aside from the fact that petitioner has not been accorded the same construction of its activities as was accorded the International Harvester Company in the State Court, where the activities of both were virtually identical, it is urged that confusion will of necessity arise in the future administration of the statute. Therefore, the petition for certiorari should be sustained, so that there may be uniformity in both State and Federal Courts.

Account Stated

The decision of the Court of Appeals below to the effect that no account stated arose between the parties because no definite amount was stated or specifically mentioned is clearly untenable and against the weight of authority because there was no occasion to state the amount as it was not in dispute. The only dispute between the parties was one of law. When the Department of Treasury of the State of Indiana, by and through the "hearing judge", resolved the question of the "source of income" in favor of the petitioner and the respondent "issued" such determination to the petitioner (R. 36), there was nothing left to be put in issue and the minds of the parties therefore met. The amount assessed and paid was a specific amount and with the liability for refund resolved,

the amount to be refunded must, of course, be the amount paid.

Goodrich v. Coffin (1891), 83 Me. 324, 22 Atl. 217;

Cited with approval in **United States v. Bertelsen, & Petersen's Engineering Co.** (1939), 306 U. S. 276, 280;

Bonwit Teller & Co. v. United States (1931), 253 U. S. 258;

Woodsworth v. Kales (6 C. C. A. 1928), 26 Fed. (2d) 178.

*Departure From Accepted and Usual Course
of Judicial Proceedings.*

The petitioner has heretofore, both in the petition and in this brief, directed attention to a situation where, it is believed, the Circuit Court of Appeals below did not consider itself bound by certain material facts found by the District Court, and therefore reached a conclusion in spite of them. The truth of this statement can only be determined by a consideration of the findings which have been pointed out. We assert that since the evidence was not before the Court of Appeals, that Court was bound by the facts found and was not at liberty to reach a conclusion in disregard of the facts found (*Re 620 Church Street Bldg. Corporation* (1936), 299 U. S. 24, 27). Petitioner does not wish to further elaborate on this phase of the matter, except to say that judicial matters of this kind should certainly come under the supervision of this Court. Otherwise judicial proceedings lose efficacy in the administration of justice.

It is respectfully submitted that the petition herein for writ of certiorari should be granted.

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APPENDIX A

The Statute

Chapter 50, Acts of Indiana 1933

"AN ACT to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for the violation of the terms of this Act, and declaring an emergency."

"Section 1. Be it enacted by the general assembly of the State of Indiana, That this Act may be cited as the 'Gross Income Tax Act of 1933.'"

.....

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income; and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income *derived from sources within the State of Indiana*, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Chapter 117, Acts of Indiana 1937

"AN ACT to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment, and collection of said tax, and to provide penalties for the violation of the terms of this act, and declaring an emergency.

Be it enacted by the General Assembly of the State of Indiana:

Section 1. That this act may be cited as the 'Gross Income Tax Act of 1933.'

.....

(m) The term 'gross income,' except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer . . . received from trades, businesses, or commerce, . . . Provided, further, That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and/or foreign country, the term 'gross income' shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto . . ."

Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise

provided; and upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

The Regulations

Regulation 191. (*In force from May 7, 1933, to December 31, 1935.*)

"Any taxpayer having gross receipts derived from earnings or activities carried on entirely without the State of Indiana will not be required to include such receipts in any return already filed or to be filed prior to the time that the supreme court of the State of Indiana shall render a decision affecting the right of the State of Indiana to impose a tax thereon."

Regulation 193. (*In force from January 1, 1936, to June 30, 1937.*)

"Regulation 191 issued by the Department of Treasury respecting income derived by residents of Indiana from earnings, or from activities, carried on entirely outside the State of Indiana, is hereby revoked and the deferment privilege granted thereunder is hereby cancelled. Hereafter all income from activities from sources entirely outside the State of Indiana will be designated as 'taxable' or 'non-taxable'—the words 'deferrable' and 'non-deferrable' being no longer applicable to such income.

All persons as defined in the Gross Income Tax Act who are resident and/or domiciled in Indiana will be required to report for taxation their gross income received on and after May 1, 1933, from all sources, including that derived from out of state sources and activities except where such gross income is derived from a business regularly carried on, the situs of which is outside the state; from real property situated outside the state; or from intangibles having a business situs outside of Indiana and such intangibles are not held within the State of Indiana. The mere fact that income is received from a point located out of the State will not of itself affect the taxability of such income.

For the purpose of fixing the taxable status of specific kinds of income, the following rulings are made as a part of this regulation with respect to the classifications set out.

.....

4—RECEIPTS FROM BUSINESSES MAINTAINED AND OPERATED WHOLLY OUTSIDE THE STATE. Persons resident and/or domiciled in Indiana who are engaged in business, the legal situs and location of which is in states other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom. For the purpose of this ruling the operation of a farm will be included under the term 'engaged in business.' "

Regulation 3500. (*In force from July 1, 1937, to end of period covered by this case.*)

"Taxable and Non-Taxable Income Received from Sources in Other States. All persons as defined in the Gross Income Tax Act who are resident and/or domiciled in Indiana will be required to

report for taxation their gross income received from all sources, including that derived from out of state sources and activities except, (1) where such gross income is derived from a business regularly carried on, the situs of which is outside the state; (2) income from real property situated outside the state; (3) or income from intangibles having a business situs outside of Indiana and which intangibles are not held within the State of Indiana. The mere fact that income is received from a point located out of the State will not of itself affect the taxability of such income.

Note: Indiana has no reciprocal agreement with any other state whereby deductions or credits may be taken by either resident or non-resident taxpayers on account of income earned in other states or on account of taxes paid thereon to such other states.

For the purpose of fixing the taxable status of specific kinds of income, the following rules are made as a part of this regulation with respect to the classifications set out:

RULE 4—RECEIPTS FROM BUSINESSES MAINTAINED AND OPERATED WHOLLY OUTSIDE THE STATE. Persons resident and/or domiciled in Indiana who are engaged in business, the legal situs and location of which is in states other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom. For the purpose of this ruling the operation of a farm will be included under the term 'engaged in business.' "

Regulation 3600. (*In force from July 1, 1937, to end of period covered by this case.*)

"Extent of Tax Liability of Non-Residents. Section 2 of the gross income tax Act provides that the tax shall be imposed upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana. Since non-residents are entitled to the same annual exemption as residents, therefore they will be liable for making return of and payment of tax upon all gross receipts derived from Indiana sources in excess of \$1,000 in any calendar year."

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AUG 24 1944

CHARLES EDWARD DUDLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 958

75

FORD MOTOR COMPANY,

Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. Clifford Townsend, Joseph M. Robert-
son, and Frank G. Thompson, as and Constituting the
Department of Treasury of the State of Indiana,

Respondents.

ON CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER

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ON CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals is reported in the case of *Ford Motor Company v. Department of Treasury of the State of Indiana*, 141 Fed. (2nd) 24, and was rendered on March 4, 1944, and may also be found in the record, page 98. Certiorari was granted by this Court on May 29, 1944.

JURISDICTION

The jurisdiction of this Court was invoked on petition for certiorari under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U. S. C. A. Sec. 347.

STATEMENT OF THE CASE

This was an action commenced in the United States District Court for the Southern District of Indiana, Indianapolis Division, by the petitioner against the respondent, to recover taxes assessed against and paid by the petitioner for the years 1935, 1936, and 1937, under the Indiana Gross Income Tax Act of 1933 and under the same act as amended in 1937. The tax assessed, and for which recovery was sought, related to two classes of sales, referred to in the findings and in the proceedings as Class A sales and Class B sales. Class B sales related to transactions which involved petitioner's branch in the State of Indiana. A refund on this class of sales is not claimed. The "Class A sales" involve transactions considered by the petitioner to be wholly outside the State of Indiana, and are transactions made and concluded by petitioner's branches at a situs outside the State of Indiana, and on this phase of the controversy petitioner clings to its claim for a refund of the amount, including interest, actually assessed and paid on this particular class of sales, to-wit, the sum of \$78,514.10 (R. 77). The District Court denied petitioner relief, and on appeal to the Circuit Court of Appeals the judgment of the District Court was affirmed (*Ford Motor Co. v. Dept. of Treasury of the State of Indiana*, 141 Fed. (2nd) 24), also see record here, page 98.

The petitioner's complaint is based on two theories, first, that the tax on the receipts of Class A sales sought to be recovered is invalid as in violation of the commerce clause, Article I, Sec. 8 of the Federal Constitution because laid upon receipts derived from interstate commerce and constituting an undue burden upon such commerce; and, second, that the assessment of the tax on receipts of Class A sales was illegal because the "source" of such receipts was not within the State of Indiana, as specifically required by statute (R. 2).

The supplemental complaint is based on the theory that, after this action was commenced, petitioner and respondent agreed on a refund of such taxes; therefore, an account stated arose between the parties (R. 26).

The facts were found by the District Court. The facts relating to the class of transactions here involved (Class A sales) may be summarized as follows:

Situs and Source of the Income Involved

Petitioner was a corporation foreign to the State of Indiana (R. 41). All of its products were manufactured outside the State of Indiana (R. 42) and sold by its branches located outside the State of Indiana to independent dealers located within the State of Indiana. These independent dealers sold to the ultimate consumer (R. 43). All of petitioner's dealers in Indiana involved in "Class A sales" were assigned to and allocated to various branches located in Louisville, Kentucky, Chicago, Illinois, and Cincinnati, Ohio (R. 42).

Orders for petitioner's products were forwarded by the dealers to and received by petitioner's branches outside

the State of Indiana (R. 49, 50). The products were manufactured to the specification of the dealer's order (R. 52) by petitioner's assembly plants whose situs were likewise outside the State of Indiana (R. 78). Due to the importance of the finding with regard to the actual delivery of the products to the dealer, we quote the finding which specifically relates to that subject. After finding the facts relating to the manufacture of the products ordered by the dealer, the District Court specifically found:

"(f) The car then rolls off of the end of the line to the door of the assembly building where it is filled with gas and oil, and then is driven out of the plant by an employee of the plaintiff, and on the grounds of the plaintiff receives a short road test and a final check. It is then brought to the gate of the assembly branch and at that gate a representative of the independent truck-away company, or the dealer himself who is to receive the car checks the car with the car checker of the plaintiff. If the car is found to match the invoice, the checker of the plaintiff at gate signs the invoice on the line marked 'Initials of Car Checker.' The dealer or the independent truck-away company as agent of the dealer signs the invoice on the line marked 'Signature of Dealer (indicating receipt),' and dates his signature with the date that the car leaves the gate. The dealer, or the dealer's representative of the truck-away company, then gets into the car and drives it off of the plaintiff's property (R. 52).

"(h) It has been a custom of long standing for the employees of the truck-away company to sign for the dealers as their agent. All dealers know of the practice, and have acquiesced fully in it" (R. 53).

The truck-away or convoy company referred to was not owned by the petitioner but was an independent carrier

(R. 56), and the risk of loss after the products left the gate of petitioner's assembly plant was on the carrier (R. 56).

The price for the products involved was either (1) paid in full before they left the gate of the assembly plant; (2) paid in whole or in part by finance papers executed before the products left the gate, by the dealer or a representative of the truck-away company who was authorized by written power of attorney to execute such papers by the dealer; or (3) by payment in cash to the truck-away company at dealer's place of business or by finance papers executed by the truck-away company as agent for the dealer after the products left the branch (R. 53). Although the price was not always paid in full before the car or truck, or other products, left the gate of the assembly plant

"plaintiff looks to the truck-away company for payment in full" (R. 56).

Under the contract between the petitioner and its said dealers, title to its products was reserved until the price was paid but by further provisions of the contract it was agreed that:

"but regardless of title remaining in the Company or having passed to Dealer, all shipments shall be at Dealer's risk from the time of delivery to carrier at place of shipment" (R. 45).

The trial court further found:

"The collections so received by the truck-away or convoy companies were by them taken and delivered in due course to the respective branches of the plaintiff aforesaid entitled to receive the same, were deposited by such branches in their regular depository as hereinbefore found, and were there-

upon subject to the further order and disposition by the plaintiff as its property" (R. 64).

Petitioner, in the first instance, paid the truck-away company's transportation charges, but under its contract with the dealers was reimbursed for freight charge from Dearborn on separate items set up on the invoice to cover the charge (R. 56).

In a few instances after invoices were made out to the dealer, and either before or after the car left the assembly plant gate, the car was re-allocated to another dealer on advice of a branch (R. 57-59).

Intermingled with the District Court's findings of fact are certain conclusions which are wholly repugnant to the specific facts otherwise found and heretofore recited, namely:

"All of the gross receipts . . . upon which the taxes and interest were assessed and collected . . . were received by plaintiff while it was engaged in business in Indiana, and derived from sources within Indiana . . ." (R. 79-80).

And, further that in making collections the truck-away or convoy company was acting as the agent for the petitioner (R. 80).

The United States Circuit Court of Appeals, by its opinion and judgment held:

"From these findings, it is clear that Class A sales were sales of merchandise manufactured and assembled outside of Indiana but that every transaction in the sale, with the exception of the shipment of the goods and the receipt of some orders, took place in Indiana."

The Account Stated

During the pendency of this action petitioner, at the invitation of respondent, requested a rehearing on its claim for refund (R. 68-69). The claim was reviewed by the respondent on its merits, and on March 1, 1941, the hearing judge of the Department, who had authority and power to bind the Department (R. 39-40), by written opinion determined that:

"The Department will accordingly take the necessary steps to make refund of the gross income tax paid on the transaction outlined above" (R. 75).

The transactions outlined in the opinion are described by the "hearing judge" in these words:

"These Indiana customers are for the most part retail automobile dealers. The Ford Motor Car Company will make delivery of such automobiles to the Indiana customers or to their authorized agents at the delivery gate of its out-of-State manufacturing plant or assembly plant. Deliveries of the products desired by Indiana customers are made under conditions whereby the Ford Motor Car Company, at the time of the delivery to the customers or the customers' authorized representatives, will be paid for the products, or appropriate financing will be arranged for by the customers or by their authorized agents.

"It is further disclosed that the Ford Motor Car Company in regard to sales made to Indiana customers resident within the territorial jurisdiction of the outside manufacturing and assembling plants does not have the obligation or the responsibility, under the terms of the sale, to make delivery of the products desired by Indiana customers to these customers across State lines, nor does any obligation or responsibility to initiate such transportation

across State lines exist. It is indicated that the entire responsibility of the Ford Motor Car Company to the customer ceases at the time of delivery of the products to the Indiana customers or to their authorized representatives at the delivery gate of the manufacturing or assembling plants outside of the State of Indiana.

"It is, therefore, indicated that such a transaction is completed at a business situs entirely outside of the State of Indiana, and that such a transaction is not a transaction made in interstate commerce, and that the question of facilities is not existent in this transaction" (R. 74-75).

The amount of the award was not stated in the opinion, but the District Court found, as to "Class A" transactions, that, before the determination of the hearing judge aforesaid, counsel for both the petitioner and respondent, as well as the hearing judge, agreed:

"that the \$78,000 part of the claim had been audited and those figures agreed upon at the time it was paid" (R. 71).

Respondent, by answer filed in this cause before the determination of the hearing judge aforesaid, admitted that the amount assessed and paid (including interest) on account of

"gross receipts from the sale of cars, trucks, and parts to dealers located within the State of Indiana where such payments or gross receipts and business was allocated by the plaintiff to its Chicago, Illinois, or Cincinnati, Ohio, or Louisville, Kentucky, branches"

(Class A Sales), was the sum of \$78,514.10 (R. 21). Later, on December 1, 1941, for the purposes of the trial, the parties stipulated that the amount of tax paid on account of those sales was \$78,514.10. The Court further found:

"This item of \$78,514.10 was known and referred to by the parties in some of their discussions as the \$78,000.00 claim, and was thus distinguished from the claim of \$37,259.24, which was known and sometimes referred to by them as the \$37,000 claim" (R. 66).

The amount of the claim was not at any time in dispute, and could not be more or less than the amount actually assessed and paid. The determination was never rescinded or withdrawn by respondents (R. 76).

Petitioner later, and during the course of the proceedings in the District Court, filed a supplemental complaint seeking recovery on the theory of an account stated.

Opposed to the foregoing specific facts found or admitted are other statements which are included in the findings of fact as follows:

"Defendant did not know what plaintiff's gross income from such transactions was when said order was issued . . ." (R. 77).

"At no time did defendant or any of its attorneys, agents or employees promise plaintiff that the sum of \$78,514.10, or any other specifically stated amount would be refunded to plaintiff. No certificate of over-assessment was issued to plaintiff by defendant at any time" (R. 77).

The United States Court of Appeals in this cause further held:

" . . . the alleged account stated was not found to be for any specific amount."

(The determination made by the hearing judge was binding on the Department. In this respect the District Court found:

"Elmer F. Marchino is the Hearing Judge of the Gross Income Tax Division of the Department of Treasury, and has been such continuously since May, 1933. As such, he hears and determines objections to proposed additional assessments of Gross Income Tax and petitions for the refund of Gross Income Tax. He has the power and authority to determine the facts involved on any notice of proposed assessment of additional tax or petition for refund of tax, and the right to determine, from a legal status, the policy of the Department" (R. 41-42).

The respondent's answer admitted:

"The defendants admit that thereafter, and on March 1, 1941, the defendant Department of Treasury acquiesced in the plaintiff's petition for reconsideration of its ruling, and issued a second letter of finding, dated March 1, 1941, which read as follows: . . ." (R. 36).

(Then follows a copy of the letter relied upon in petitioner's supplemental complaint and referred to in the findings (R. 36).)

Respondent further admitted by its answer:

"The defendants further answering paragraph '4' admit that on or about March 1, 1941, the defendants mailed the letter of findings reproduced above to the plaintiff" (R. 38).

Notwithstanding the foregoing specific findings of the trial court and the admissions of Respondent's answer, the Court of Appeals held:

" . . . the hearing judge's later ruling was not approved by the department. . . . No one, who was authorized to do so stated an account. . . ."

SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the "source" of petitioner's gross income from "Class A sales" was within the State of Indiana.

2. In holding that petitioner's gross income from sales made by it on orders received and accepted, goods manufactured and deliveries made to its dealers and their carrier agents, all done at a situs outside the State of Indiana, was subject to the imposition of the tax laid by Section 2 of the Gross Income Tax Law of the State of Indiana enacted in 1933, Burns' Indiana Revised Statutes (1933), Sec. 64-2602, and amendment thereto of 1937, Burns' Indiana Revised Statutes (1943), Sec. 64-2602, contrary to the local applicable decision of *Department of Treasury v. International Harvester Co.* (1943), 47 N. E. (2d) 150.

3. In holding that no account stated arose between petitioner and respondent as to "Class A sales," where the amount was not in dispute and respondent, upon a hearing upon the merits of the claim, made and issued to petitioner an order for the refund of the taxes involved.

4. In disregarding the specific facts found by the District Court and basing its decision solely upon conclusions of law of the District Court, intermingled with findings of fact, which are inconsistent with and repugnant to the specific facts found.

SUMMARY OF ARGUMENT

Validity of the Tax—Source of Income

The tax imposed by the Indiana Gross Income Tax Act of 1933 and as amended in 1937 is not a use tax but a tax imposed upon and measured by the amount of the gross income of the taxpayer.¹

As to nonresidents of the state, the imposition of the tax is limited to the gross income which is "*derived from sources within the State of Indiana.*" Under the 1937 amendments of the Act, the gross income of residents of the state received from sources outside the state are exempted. (Appendix, pp. 29-30.) The decision of the court below is in conflict with the applicable decision of the Supreme Court of Indiana in the case of *Department of Treasury v. International Harvester Co.*, — Ind. —, 47 N. E. (2nd) 150,² because under the facts found by the trial court it can not be said that the source of petitioner's income was within the State of Indiana, since the orders were received and accepted outside the state, the goods manufactured outside the state, the price received outside the state and the goods delivered to the purchaser outside the state.

The statute involved does not even purport to lay a tax upon income produced from a source outside the state. If it had, it would be invalid because the commerce clause of the Federal Constitution precludes liability for a tax thus laid. (*McLeod, Commissioner, v. J. E. Dilworth Co., etc.*, 64 Sup. Ct. Rep. 4023, No. 311, decided May 15, 1944). Fur-

¹ Pertinent statutes and Regulations are set forth in Appendix, *infra*, pp. 28-33.

² *Department of Treasury v. International Harvester Co.*, was before this Court on appeal, No. 355, on questions other than sales of the character of "Class A Sales", there and here involved.

thermore, such a tax would be in violation of the Fourteenth Amendment to the Constitution. (*Hans Rees' Sons v. North Carolina* (1931), 283 U. S. 123, 131-132; *Guaranty Trust Co. v. Virginia* (1938), 305 U. S. 19, 23.)

The Account Stated

Under the findings of the trial court, the respondent, upon a hearing on the merits of petitioner's claim for a refund, determined that the petitioner was entitled to a refund by reason of the fact that the transactions producing the income involved occurred at a situs outside the state of Indiana. The amount of the refund was not in dispute, had been determined by an audit prior to the time the tax was assessed and was represented by the actual amount assessed and paid, being the sum of \$78,514.10. The amount not being in dispute and respondent having determined this liability for a refund under the facts, an account stated arose between the parties. The court below erred in holding that no account stated arose under the facts found by the trial court.

ARGUMENT

Validity of the Tax—Source of Income

The question in this case, as it was in the case of *Department of Treasury v. International Harvester Co. (Ind.)*, 47 N. E. (2nd) 150, is this—Was the source of petitioner's income derived from Class A sales within the State of Indiana? If the source of that income was within the State of Indiana, it was taxable; if it was not, then clearly the income was exempt under the language of the statute.

The court below, in distinguishing the case at bar from the International Harvester case, decided this question in the following language:

“Thus it will be seen that in that case the articles were accepted and paid for outside of Indiana, while in the case at bar they were accepted and paid for in Indiana. In one case, we have a sale within Indiana, which is covered by the statute, and in the other, a sale without Indiana not covered by the statute.”

Petitioner is obliged to challenge the statement of the court below as being in total disregard of the actual basic facts found by the trial court and the importance of these facts lead us to demonstrate the comparative facts in both cases.

In the Harvester case, orders were solicited in Indiana by representatives of the company. In this case no solicitation took place in Indiana. In the Harvester case the orders, though solicited in Indiana, were accepted by the taxpayer outside the state. In the case at bar orders for its products were forwarded by dealers to branches of petitioner outside

the State of Indiana and were accepted outside the state (R. 49, 50). In the Harvester case the goods were shipped to the purchasers in Indiana from branches, warehouses or factories located outside of Indiana. In the case at bar the products were delivered to the dealer or the dealer's agent immediately as they came off of the assembly line outside the state (R. 52). In the Harvester case the purchase price was paid to the outside branches (method not disclosed). In the case at bar the purchase price was either paid to the outside branches, in cash, before shipment, or was collected by an independent carrier and carried back and delivered to the petitioner's branches outside the State of Indiana (R. 53). In the Harvester case, by contract, title to the goods was retained until the purchase price was paid.⁴ In this case title is reserved by the petitioner in its initial dealer's contract but in connection with the actual operation under that contract the court found that "plaintiff looks to the truck-away company for payment in full" and shipment was at buyer's risk (R. 56). In the Harvester case the taxpayer at all times had facilities for the manufacture and sale of the goods involved in the State of Indiana, whereas in the case at bar the petitioner had no facilities whatever with which to manufacture, and from which to deliver the goods involved within the State of Indiana. Thus, unless the specific facts found by the trial court are to be totally disregarded, the basic facts in both cases, as to the source of income, are parallel and indistinguishable, and, where the facts appear to be different, a stronger case is manifestly made for the exemption from the tax here than in the Harvester case. It is very clear that the court below, when it declared that the goods in-

⁴ This fact does not appear on the face of the Indiana Supreme Court's opinion but is shown by the record and will not be disputed by respondent.

cluded in Class A sales were accepted and paid for in Indiana, disregarded the plain facts found by the trial court and thus it was able, on a bare unsupported statement, to distinguish the case at bar from the Harvester case. We confidently assert that in the administration of justice no court is at liberty to disregard facts to which all parties are definitely committed. When the trial court found, as it did, that "the dealer or dealer's representative of the truck-away company then gets into the car and drives it off of the plaintiff's property" outside the State of Indiana (R. 52), it will not do for the court to say that the goods were accepted in Indiana. When the findings of fact show that this same dealer's representative, an independent carrier, carries the price back to the outside branch entitled to receive the same "and were thereupon subject to the further orders and disposition by plaintiff as its property" (R. 64), it will not do for the court to say that the price was received by petitioner within the State of Indiana.

In the light of the positive record of the facts, it may be well understood why the dissenting judge below was obliged to write:

"I am sorry to say that after mature consideration, I find it impossible to distinguish the facts here from those in *Department of Treasury v. International Harvester Company*, 47 N. E. (2d) 150 (Ind). . . ."

It has been urged by respondent in the court below, and will probably be urged here, that the findings of fact also show that, in isolated instances, products were diverted in the course of transit to accommodate dealers so that urgent customers of the dealers might be satisfied, and that therefore control of the goods is thus demonstrated. In this

connection it is to be pointed out that rebillings for all purposes amounted to less than two per cent (R. 59). Rebillings on account of diversion represent only a small fraction of the two per cent and the actual percentage or number was not found. It does not appear that petitioner had a legal right to divert shipments in transit—only that it did so in a comparatively few instances. On the contrary, if the facts found by the trial court are to be accepted, as they must be, the delivery was made to the dealer or the truck-away company as its agent, outside the State of Indiana, and that “plaintiff looked to the truck-away company for payment in full” (R. 45). This being true, it is self-evident that petitioner actually had no further control over the property and no legal right to substitute consignees, and when it did so, the activity of so doing must have been accomplished by acquiescence of the dealers involved, for their accommodation, and not for the production of income on the part of the petitioner.

Of course it can not be intelligently urged that this slight activity, incident to the business of its dealers, not its own, legally constitutes the source of petitioner's income or an activity which produced the income and therefore overcomes all the basic elements of completed transactions outside the state. Nor can it be intelligently asserted that the taxing statute in question imposes a tax upon an activity of this kind, independently of whether it produced the income or not. The most that can be said is, that by reason of these isolated transactions, petitioner was engaged at least in some slight activity within the State of Indiana to accommodate a dealer. Even so, the Supreme Court of Indiana, in construing the statute in question, in the *Harvester* case *supra*, being confronted with the activity of the International Harvester Company in soliciting orders

in Indiana, and the argument that such conduct of business made its outside transactions taxable in Indiana, decided the question in the following language:

"The appellants would have us construe the statute as exempting only income derived entirely from activities outside of Indiana. This would distort the clear import of the language employed and violate the rule stated above. Under Class A the orders upon which the goods were sold were accepted outside the confines of Indiana, and payment was made to branches in other states. There was no showing of a tax evasion. We cannot say that income so received by the appellees was 'derived from sources within the state of Indiana.' "

Respondent will no doubt also contend, as it has done before, that the reservation of title in the dealer's original contract with petitioner completely destroys the theory that title passed when the goods were delivered to the carrier outside the State of Indiana. We have already pointed out that this element was before the Supreme Court of Indiana in the International Harvester case and did not affect the exemption claimed and also that reservation of title cannot be said to constitute the source of the income. However, the facts in this case are stronger for the petitioner on this subject than in the case referred to. True, by agreement, title was contracted to be reserved until the price was paid, but the facts found show that, in the performance of this contract, the provision of the contract referred to was clearly waived, and that title in fact actually passed outside the state, for, if we accept the facts found by the trial court, the goods were delivered to the dealer's agent outside the state, without the payment of the price, and "plaintiff looks to the truck-away

company for payment in full" (R. 56). This being true in the actual performance which produced the income in question, the intent to pass title is clear.

In addition to the foregoing, it is pointed out that under the terms of the sale of the products involved, producing the income upon which the tax is here laid, there was no contractual obligation on the part of petitioner to deliver the goods to the dealers in the State of Indiana. On the contrary, the contract provides "The company will sell its products to the dealer f. o. b. Detroit, Michigan . . ." (R. 44); and further provides " . . . regardless of the title remaining in the company or having passed to the dealer, all shipments shall be at dealer's risk from the time of delivery to carrier at place of shipment" (R. 45). On the subject of freight, the contract provides "In addition to the payments hereinbefore specified, Dealer shall pay Company such amount as Company shall from time to time determine for freight, crating, boxing, packing, double-decking, loading, delivering, and other handling expense. On rail or boat shipments, Dealer shall be credited against the amount so fixed, in a sum equal to any freight actually paid by Dealer." (R. 44.)

Under these facts and under elementary rules, title to the goods passed upon delivery to the carrier outside the State of Indiana, and the very most that can be said with reference to the interest of petitioner in the goods, after delivery to the carrier as agent for the dealer, is that such a reservation represented merely a security interest in the property, and nothing more.

**United States v. Andrews (1907), 207 U. S. 229;
46 Am. Jur., page 611, and authorities collected;
Sec. 19, Uniform Sales Act;**

Sec. 22, Par. (a) Uniform Sales Act;

Sec. 20, Par. (2) Uniform Sales Act;

Jones v. United States (1909), (C. C. 4), 170
Fed. 1;

Savannah Chemical Co. v. Grace & Co. (1923), 293
Fed. 145;

Maffei v. Ginocchio (1921), 299 Ill. 254, 132 N. E.
518;

The Pennsylvania Co. v. Poor (1885), 103 Ind. 553.

It therefore follows that since the goods were delivered to the independent carrier as the agent of the dealer outside Indiana, and since the carrier became responsible for the price, the things which the carrier did within the State of Indiana, in carrying the goods to the dealer and carrying back the price to the seller, were wholly the activity and the business of the carrier and not that of the petitioner. Such activity was not the "source" of petitioner's income for it did not produce it.

Compania General De Tabacos De Filipinas v.
Collector of Internal Revenue (1929), 279 U. S.
306;

Comr. v. East Coast Oil Co., S. A., 85 Fed. (2nd)
322, (C. C. A. 5th 1936), Cert. Den. 299 U. S.
608.

In that view, petitioner had no activity whatever in the State of Indiana from which income was derived, and the Harvester decision of the Supreme Court of Indiana is controlling.

A portion of the income involved here accrued after the 1937 amendment of the 1933 Gross Income Tax Act.

The amendment of Section 2 of the act added the words "activities or businesses" and coupled them with the words "and any other sources within the State of Indiana," whereas the 1933 act used only the word "source." It is obvious that no actual change is made by the amendment. In any event, the income must be "derived" from activities in Indiana or be "derived" from "business in Indiana" or be "derived" from "other sources" in Indiana. The words "other sources" impresses the words "activities and businesses" as "sources" of income, nothing more. An activity or business which was a source of income was certainly included under the word "source" as used in the 1933 act. This seems to be too plain to be open for argument. If it is to be argued by respondent that under this amendment incidental activities of a business carried on at a situs outside of Indiana may be taxed as the source of income of non-residents, then it must, by such an argument, concede that the statute discriminates against non-residents, for the same amendment, as to residents of Indiana, provides:

"(m) The term 'gross income,' except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer . . . received from trades, businesses or commerce, . . . Provided, further, That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and/or foreign country, the term 'gross income' shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto . . ." (Appendix, p. 29).

If the validity of the 1937 amendment is to be sustained, it can not be said that the act imposes a tax upon the income of a business or trade, situated and regularly carried on by non-residents at a legal situs outside the State of Indiana, and from activities incident thereto, because by the same act, the income of residents is exempted in the very language which would impose the tax on the income of non-residents produced in precisely the same way. In the case at bar, under the language of the statute, if a resident had conducted a business and made sales precisely as respondent did, it could not be claimed that a tax was imposed by the statute upon the resulting income. Since the statute can be construed as to avoid discrimination, it should be so construed, and if not, it should be stricken down on constitutional grounds, for Indiana may not so discriminate against non-residents.

Petitioner is not unmindful of the further finding by the District Court set forth on the face of the opinion below to the effect that the gross receipts "were received by plaintiff while it was engaged in business in Indiana and derived from sources within Indiana" but confidently asserts that this finding is an erroneous conclusion of law and does not overcome specific facts which, as a matter of law, impel a contrary conclusion.

United States v. Jefferson Electric Manufacturing Company (1933), 291 U. S. 386, 407;

Pike Rapids Power Company v. Minneapolis, etc. Company, 99 Fed. (2d) 902, Cert. Den. 305 U. S. 660;

Utter v. Eckerson (C. C. A. 9th 1935), 78 Fed. (2d) 307, 308.

There is also another finding relied upon by the Court of Appeals to the effect that the carrier, in making the collection of the price, did so as the agent of the petitioner. In view of the specific findings by the District Court that petitioner "looked to the truck-away company for payment in full" (R. 56) and "risk of loss was on the truck-away company" (R. 56) this statement in the finding would also appear to be an erroneous conclusion, contrary to the specific facts found, but, regardless of the character of the statement, whether a conclusion of law or an ultimate fact, the collection of the price by a carrier, as hereinbefore pointed out, can not correctly be said to be the "source" of petitioner's income under the statute as construed by the Indiana Supreme Court.

Account Stated

There is not the slightest doubt that respondent, in its official capacity, made a determination that the transactions involved here, which were the source of and produced the income in question, took place at a business situs outside the State of Indiana. The reading of the opinion of the hearing judge, set forth in the trial court's finding at pages 73, 74 and 75, admits of no other construction of the facts. This determination was made after the action was filed and was made on request for a rehearing made by petitioner at the suggestion and instigation of respondent. There is no suggestion or intimation that any fraud or concealment was involved, or that the investigation was incomplete. There is no suggestion that this determination was ever rescinded or in any manner modified. The trial court found to the contrary. (R. 76.) The answer admits that the written award was delivered to petitioner by respondent and no contention can be legitimately made

that the amount was at any time in dispute. As to the out of state transactions covered by Class A sales, nothing remained to be done except for respondent to do what it agreed to do, namely, "The Department will accordingly take the necessary steps to make refund of the gross income tax paid on the transaction outlined above." (R. 75.)

The decision of the court below on this phase of the case turned, first, on the authority of the "hearing judge" to make a binding order, and, second, on whether the amount of the award must of necessity be stated in the award as some definite and certain amount. On the first point, the court below is believed by petitioner to have gone outside the record to make a determination to the effect that the "hearing judge" had no authority to make the order. The decision in this respect ignored the respondent's answer, the averments of which conceded that the order of the "hearing judge" was delivered by respondent to the petitioner. (R. 36.) This admitted fact takes out of the case any question as to the authority of the "hearing judge" for, regardless of the authority of the "hearing judge," the delivery by the respondent Department made the order authentic and binding. The Department was created by statute for the purpose, among other things, of determining and authorizing refunds, but even if this admission and the fact of delivery did not remove this question, the findings of fact by the District Court (R. 41) clearly stated, referring to the power and authority of the hearing judge, "He has the power and authority to determine the facts involved on any . . . petition for refund of taxes and the right to determine, from the legal status, the policy of the Department." Thus, when the court below determined that "the hearing judge's

later ruling was not approved by the Department," it went beyond the issues and clearly outside the record before it, and when it held that the hearing judge had no authority to make the order, it must, of necessity, have disregarded the specific findings of the trial court to the contrary, as well as the admission of respondent's answer. The plain language of the finding and the plain language of the answer refute the holding of the court below and completely sustain petitioner's contention that the minds of the parties met and that a contract resulted.

As to the second point, the court below determined that "the alleged account stated was not found to be for a specific amount." Therefore it was determined that there was no liability on the theory of an account stated. To make this determination the court below must have been obliged to disregard the District Court's finding of fact, namely, "that the Seventy-eight Thousand Dollar part of the claim had been audited and those figures agreed on at the time it was paid." (R. 71.) Since the amount was not in dispute, and since it could neither be more nor less than the amount assessed and actually paid on this class of sales, the designation in the award of the specific amount was not necessary to constitute an account stated.

Goodrich v. Coffin (1891), 83 Me. 324, 22 Atl. 217;
**Cited with approval in United States v. Bertelsen
 & Petersen Engineering Co.** (1939), 306 U. S.
 276, 280;
Bonwit Teller & Co. v. United States (1931), 283
 U. S. 258;
Woodworth v. Kales (6 C. C. A. 1928), 26 Fed.
 (2nd) 178.

Therefore the decision of the court below is clearly untenable and erroneous on this phase of the case.

CONCLUSION

Under the rule in the case of *Eric Railroad Co. v. Tompkins* (1938), 304 U. S. 64, and subsequent decisions of this Court, the decision of the Supreme Court of Indiana, construing, as it does, a local statute, is binding upon the Federal Court. The Supreme Court of Indiana, having construed transactions of the character here disclosed as not constituting a source of income within the State of Indiana, which is taxable under the Gross Income Tax Act of Indiana, should be followed and its decision applied in the case at bar.

It is further insisted by petitioner that the Department of Treasury of Indiana, having, after investigation and a full hearing, determined "that the entire responsibility of Ford Motor Car Company to the customer ceases at the time of the delivery of the products to the Indiana customers or to their authorized representatives at the delivery gate of the manufacturing or assembly plants outside the State of Indiana," and the District Court, by its findings of fact, having confirmed that factual situation, respondent is precluded, on the facts and the law, from disputing its liability to keep the covenant which it made and delivered to the petitioner "to make the refund of the gross income tax paid on the transactions outlined above

If it be determined by the Court that neither position stated above is correct, then petitioner submits that the statute must be held invalid, not only because of discrimination between residents and non-residents of the state on the same subject matter but, on the authority of the case of *McLeod, Commissioner, v. J. E. Dilworth Co., et al.*, 64

Sup. Ct. Rep. 1023, No. 31, because if the statute imposes a tax upon transactions of the character here disclosed, it violates the due process and commerce clauses of the Federal Constitution. For Indiana "to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction."

It is respectfully submitted that this cause should be reversed, with a determination of the liability on the part of respondent to refund the full amount of the tax paid by petitioner on its Class A sales, amounting to the sum of Seventy-eight Thousand Five Hundred Fourteen Dollars and Ten Cents (\$78,514.10), with interest from the date of payment of costs.

MERLE H. MILLER,
Counsel for Petitioner.

JAMES A. ROSS,
Of Counsel.

APPENDIX A

The Statute

Chapter 50, Acts of Indiana 1933

"AN ACT to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for the violation of the terms of this Act, and declaring an emergency."

"Section 1. Be it enacted by the general assembly of the State of Indiana, That this Act may be cited as the 'Gross Income Tax Act of 1933'."

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income *derived from sources within the State of Indiana*, of all persons and or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Chapter 117, Acts of Indiana 1937

"AN ACT to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment, and collection of said tax, and to provide penalties for the violation of the terms of this act, and declaring an emergency.

Be it enacted by the General Assembly of the State of Indiana:

Section 1. That this act may be cited as the 'Gross Income Tax Act of 1933.'

.....

(m) The term 'gross income,' except as hereinafter otherwise expressly provided, means, the gross receipts of the taxpayer . . . received from trades, businesses, or commerce, . . . Provided, further, That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and or foreign country, the term 'gross income' shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto . . ."

Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and or domiciled in the State of Indiana, except as herein otherwise

provided; and upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

The Regulations

Regulation 191. (*In force from May 1, 1933, to December 31, 1935.*)

"Any taxpayer having gross receipts derived from earnings or activities carried on entirely without the State of Indiana will not be required to include such receipts in any return already filed or to be filed prior to the time that the supreme court of the State of Indiana shall render a decision affecting the right of the State of Indiana to impose a tax thereon."

Regulation 193. (*In force from January 1, 1936, to June 30, 1937.*)

"Regulation 191 issued by the Department of Treasury respecting income derived by residents of Indiana from earnings, or from activities, carried on entirely outside the State of Indiana, is hereby revoked and the deferment privilege granted thereunder is hereby cancelled. Hereafter all income from activities from sources entirely outside the State of Indiana will be designated as 'taxable' or 'non-taxable'—the words 'deferable' and 'non-deferable' being no longer applicable to such income.

All persons as defined in the Gross Income Tax Act who are resident and/or domiciled in Indiana will be required to report for taxation their gross income received on and after May 1, 1933, from all sources, including that derived from out of state sources and activities except where such gross income is derived from a business regularly carried on, the situs of which is outside the state; from real property situated outside the state; or from intangibles having a business situs outside of Indiana and such intangibles are not held within the State of Indiana. The mere fact that income is received from a point located out of the State will not of itself affect the taxability of such income.

For the purpose of fixing the taxable status of specific kinds of income, the following rulings are made as a part of this regulation with respect to the classifications set out.

4—RECEIPTS FROM BUSINESSES MAINTAINED AND OPERATED WHOLLY OUTSIDE THE STATE. Persons resident and or domiciled in Indiana who are engaged in business, the legal situs and location of which is in states other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom. For the purpose of this ruling the operation of a farm will be included under the term 'engaged in business.'

Regulation 3500. (*In force from July 1, 1937, to end of period covered by this case.*)

"Taxable and Non-Taxable Income Received from Sources in Other States. All persons as defined in the Gross Income Tax Act who are resident and/or domiciled in Indiana will be required to

report for taxation their gross income received from all sources, including that derived from out of state sources and activities except, (1) where such gross income is derived from a business regularly carried on, the situs of which is outside the state; (2) income from real property situated outside the state; (3) or income from intangibles having a business situs outside of Indiana and which intangibles are not held within the State of Indiana. The mere fact that income is received from a point located out of the State will not of itself affect the taxability of such income.

Note: Indiana has no reciprocal agreement with any other state whereby deductions or credits may be taken by either resident or non-resident taxpayers on account of income earned in other states or on account of taxes paid thereon to such other states.

For the purpose of fixing the taxable status of specific kinds of income, the following rules are made as a part of this regulation with respect to the classifications set out:

RULE 4—RECEIPTS FROM BUSINESSES MAINTAINED AND OPERATED WHOLLY OUTSIDE THE STATE. Persons resident and/or domiciled in Indiana who are engaged in business, the legal situs and location of which is in states other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom. For the purpose of this ruling the operation of a farm will be included under the term 'engaged in business.' "

Regulation 3600. (In force from July 1, 1937, to end of period covered by this case.)

“Extent of Tax Liability of Non-Residents. Section 2 of the gross income tax Act provides that the tax shall be imposed upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana. Since non-residents are entitled to the same annual exemption as residents, therefore they will be liable for making return of and payment of tax upon all gross receipts derived from Indiana sources in excess of \$1,000 in any calendar year.”

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DEC 6 1944

CHARLES ELMORE GROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

FORD MOTOR COMPANY,

Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH
M. ROBERTSON, AND FRANK G. THOMPSON,
AS AND CONSTITUTING THE DEPART-
MENT OF TREASURY OF THE STATE
OF INDIANA,

Respondents.

PETITIONER'S REPLY BRIEF

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No. 75
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AS AND CONSTITUTING THE DEPART-
MENT OF TREASURY OF THE STATE
OF INDIANA,
Respondents.

PETITIONER'S REPLY BRIEF

JURISDICTION

For the first time in these proceedings, respondent has questioned the jurisdiction of the Federal Court to entertain suit by this non-resident taxpayer against the Department of Treasury of the State of Indiana, respondent admitting that if it be within the power of the administrative and executive officers of the state to waive the

state's immunity, then such immunity has been waived in this action. That the right of waiver exists has long been recognized by this Court. *Clark v. Barnard*, 108 U. S. 436, 447; 27 L. Ed. 780, 784.

Respondent questions, however, whether any state official has the power to waive the state's immunity in the light of Article 4, Section 24, of the Constitution of Indiana, which reads: -

"Provision may be made by general law for bringing suit against the state, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the state, shall ever be passed."

Pursuant to the above authorization, the legislature provided in the Gross Income Tax Law of 1933, as amended by the Act of 1937:

"Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in any proper action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected." (Sec. 14 (a)).

Section 28 of the same act vests the administration of the Gross Income Tax Act in the Department of Treasury, and Section 14 (c) makes it the duty of the Attorney General "to represent the department, and/or the State of Indiana, in all legal matters or litigation, either criminal

or civil, relating to the enforcement, *construction*, application and administration of this act, upon the order and under the direction of the department."

In the enforcement of the Gross Income Tax Act, the Department of Treasury, through the office of the Attorney General, has entered its appearance and has litigated controversies with ~~non-resident~~ defendants in the following cases in the Federal Court:

Wood Preserving Corporation v. The Department of Treasury filed in the District Court, October 18, 1938. Appealed to Circuit Court of Appeals, Seventh Circuit, 114 Fed. (2d) 889. Decision of United States Supreme Court, 313 U. S. 62; 85 L. Ed. 1188;

Continental Roll & Steel Foundry Company v. Department of Treasury filed in District Court April 8, 1939. Appealed to Circuit Court of Appeals, 117 Fed. (2d) 196;

Ingram-Richardson Manufacturing Company, v. Department of Treasury filed March 15, 1939. Appealed to Circuit Court of Appeals, 114 Fed. (2d) 889; Cert. Denied 312 U. S. 687; 85 L. Ed. 1124;

Hicks Body Company v. Department of Treasury filed in District Court February 26, 1941, decided Oct. 2, 1941, no appeal;

Holland Furnace Company v. Department of Treasury filed March 22, 1941. Appealed to Circuit Court of Appeals, 133 Fed. (2d) 212; Cert. Denied 88 L. Ed. Adv. Op. 30;

Great Lakes Dredge & Dock Company v. Department of Treasury filed March 22, 1941. Consolidated with Holland Furnace Company case;

Interstate Roofing & Supply Company v. Department of Treasury filed March 22, 1941. Consolidated with Holland Furnace Company case.

By this course of action, the Department of Treasury has interpreted the clause "any court of competent jurisdiction" as including the Federal District Court. A similar interpretation has been placed upon similar words by this Court. In construing a state statute permitting suit "in a court of competent jurisdiction in Travis County, Texas," this Court said:

"The Circuit Court for the Western District of Texas is 'a court of competent jurisdiction in Travis County'."

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 391; 38 L. Ed. 1014, 1021.

Wholly apart from the reasonableness of such a construction, the subsequent wording of the act might be regarded as compelling this result. The county courts are given jurisdiction of cases involving taxpayers resident in that county. Non-resident taxpayers are given a cause of action, but could not comply with the venue requirements of the state courts, so that the statute might well be construed as leaving only the Federal courts open as a "competent court" for the enforcement of a right expressly given under the statute to non-resident taxpayers.

In entering its appearance and defending the present case on the merits, the Department was therefore not acting in contravention of the Constitution of Indiana in allowing a special suit to be brought. The legislature had already authorized the bringing of suit against the state in general terms, and in the interpretation of that language the Department of Treasury adopted a course of action permitting all non-resident taxpayers to sue in the Federal Court. Since this question goes not to the existence of the remedy against the state, but merely to the forum for the enforcement of that remedy, and since the interpretation by the Department is reasonable and of general application so as not to constitute any special act, the interpretation adopted by the Department of Treasury should be held valid by this Court, and the case should here be decided upon its merits as other cases brought under this same act have been decided upon the merits by this Court.

In *Great Northern Life Insurance Co. v. Reed*, 322 U. S. 47, this court held that the 11th Amendment permitted State officials successfully to contest jurisdiction of the Federal Court where the statute authorized suit in "the court having jurisdiction thereof," and further provisions indicated state courts as the ones intended by the legislature. But here the State officials construed the statute as authorizing suits in the Federal court. To find the Federal Court without jurisdiction here would require a holding that the 11th Amendment prohibited State officials from invoking the jurisdiction of the Federal Court as was done in the prayer for relief in Respondent's answer in the District Court, and as has been done in the other cases cited above.

PETITIONER'S CLAIM FOR REFUND

Respondent asserts that petitioner has not complied with a condition precedent to this suit in that the claim for refund filed by petitioner allegedly did not state as a reason the fact that the income was exempt under Section 2 of the Act of 1933, as amended in 1937. Wholly apart from the claim for refund, which is not a part of the record, petitioner's complaint sought recovery on the ground, among others, that the tax was predicated upon gross receipts from sources outside the State of Indiana, which receipts were exempt from tax under Section 2 of the Act of 1933, as amended in 1937. (R. 8.) Respondent's answer did not assert any technical deficiency in the claim for refund which had been filed, but denied that the source of the income was from outside of Indiana. (R. 22.) After a trial on the merits of the controversy on the issues thus formed, it is too late now for respondent to assert a formal deficiency in the claim for refund. *Federal Equity Rules*, 12 (b) (h).

APPLICATION OF THE INTERNATIONAL HARVESTER COMPANY CASE

Respondent has attached to its brief as Appendix D the sales contract involved in *Department of Treasury v. International Harvester Co.* (1943), 221 Ind. 416, which decision with respect to Class A sales is regarded by petitioner as controlling with respect to the Class A sales in this case. That sales contract which was included in the record in Cause 355, October Term 1943, *International Harvester Co. v. Department of Treasury*, 321 U. S., permits an accurate comparison between the conditions under which Class A sales were effected in that case and

the conditions surrounding the Class A sales in this case. Keeping in mind that there was no solicitation of orders in Indiana with respect to Class A sales here involved, whereas there was solicitation of the Class A sales by agents of the seller in Indiana in the International Harvester case, the following is a comparison of the conditions surrounding Class A sales in each case according to the contracts in effect with the dealers in each instance:

<i>Ford Contract</i>	<i>International Harvester Contract</i>
----------------------	---------------------------------------------

Acceptance of Orders

Outside Indiana

Outside Indiana

Delivery

To carrier as agent for
buyer outside Indiana

At point of shipment outside
Indiana

Title

Reserved in seller until
payment

Reserved in seller until
payment

Risk of Loss

On buyer from time of de-
livery to carrier outside
Indiana

On buyer from time of
delivery to carrier outside
Indiana

Payment

At branch outside Indiana
or to carrier in Indiana
for transmission to seller
outside Indiana

According to schedule
attached to each contract.
No schedules are in the
record.

The only conceivable difference between the two cases relates to the method of payment which was not covered specifically in the *International Harvester* case, but which in the present case was found in some instances to be made to the carrier as agent for the seller. This agency on the part of the carrier would be no different than the agency relationship existing in any C. O. D. shipment, and does not affect the place of sale nor the source of the income. In *Department of Treasury v. Wood Preserving Corp.*, 313 U. S. 62; 85 L. Ed. 1188, railroad ties were accepted by the purchaser in Indiana, but payment was made to the seller in Pittsburgh, Pennsylvania. Yet this Court held that the place of sale governed the application of the Indiana Gross Income Tax and the place of payment was not determinative.

The decision of the Indiana Supreme Court in *Department of Treasury v. International Harvester Company* would therefore govern the application of tax to the Class A sales for those years prior to 1937, and would govern with respect to the year 1937 unless the amendments effected in 1937 materially changed the act so as to require a different result. The amendment of 1937 was actually a re-enactment of the Gross Income Tax Act of 1933, wherein the original act was completely re-written, and in some instances completely rearranged, the act being almost doubled in length in this process of revision. Section 2 of the Act of 1933 was altered as a part of this revision by the elimination of the words in struck type below and the addition of the words in italics:

"Such tax shall be levied . . . upon the receipt of gross income derived from ~~sources~~ *activities or business or any other source* within the State of Indiana, of all persons ~~and or companies~~, includ-

ing banks, who are not residents of the State of Indiana, but are engaged in business in this State or who derive gross income from sources within this State * * *

Thus the Act of 1933 levied the tax on gross income, derived from sources within the state, of non-residents engaged in business in the state or who derived gross income from sources within the state. This definition was shortened so as to provide that the tax should be levied upon the receipt of gross income by non-residents, derived from activities or business or any other source within the state. This was a mere revision in phraseology, and there is no apparent difference in meaning between the original phraseology of the 1933 Act and the somewhat shorter phraseology of the 1937 Act. In either event, the income to be taxed must be derived from sources within the state since the inclusion of the word "other" in the phrase "activities or business or any other source" necessarily means that the activities or business referred to must also be sources of the income. Since the Supreme Court of Indiana in the International Harvester case held that the source of the income with respect to Class A sales in that case was without the State of Indiana, a similar result is required in this case with respect to Class A sales under the 1937 amendment as well as under the 1933 original act.

CONCLUSION

All sales involved in the issue before this Court were sales wherein a car was built according to the order and specifications of a particular dealer, which specifications were checked and the car accepted at the location of the

branch outside Indiana. (R. 52.) A representative of the carrier acting under express authority of the dealer accepted the car on behalf of the dealer and assumed responsibility for the purchase price to the seller. (R. 53, 56.) All events occurring thereafter were merely the fulfillment of obligations assumed by the carrier and could not be said to be a source of the income to the seller, who was entitled to the sale price in full regardless of the subsequent acts of the carrier.

The carrier stored the car until such time as other deliveries warranted a trip to the location of the dealer. (R. 54.) Thereafter the carrier delivered the car to the dealer and received cash in an amount equal to the difference between the amount owing for the car and the amount of the finance papers which the carrier had executed on behalf of the dealer, or which the dealer thereupon executed. (R. 53.) If, in the collection of this cash, and in some instances the finance papers, and the transporting of such to the seller, it can be said that the carrier was acting as the agent of the seller, then it was an agency of no different character than that which obtains in every C. O. D. contract. But where, as here, the carrier has previously assumed responsibility for the purchase price, the subsequent acts of the carrier in Indiana cannot be said to be the source of the income to the seller, but instead that source is at the branch outside Indiana where the carrier accepted the car on behalf of the dealer and assumed responsibility for the purchase price.

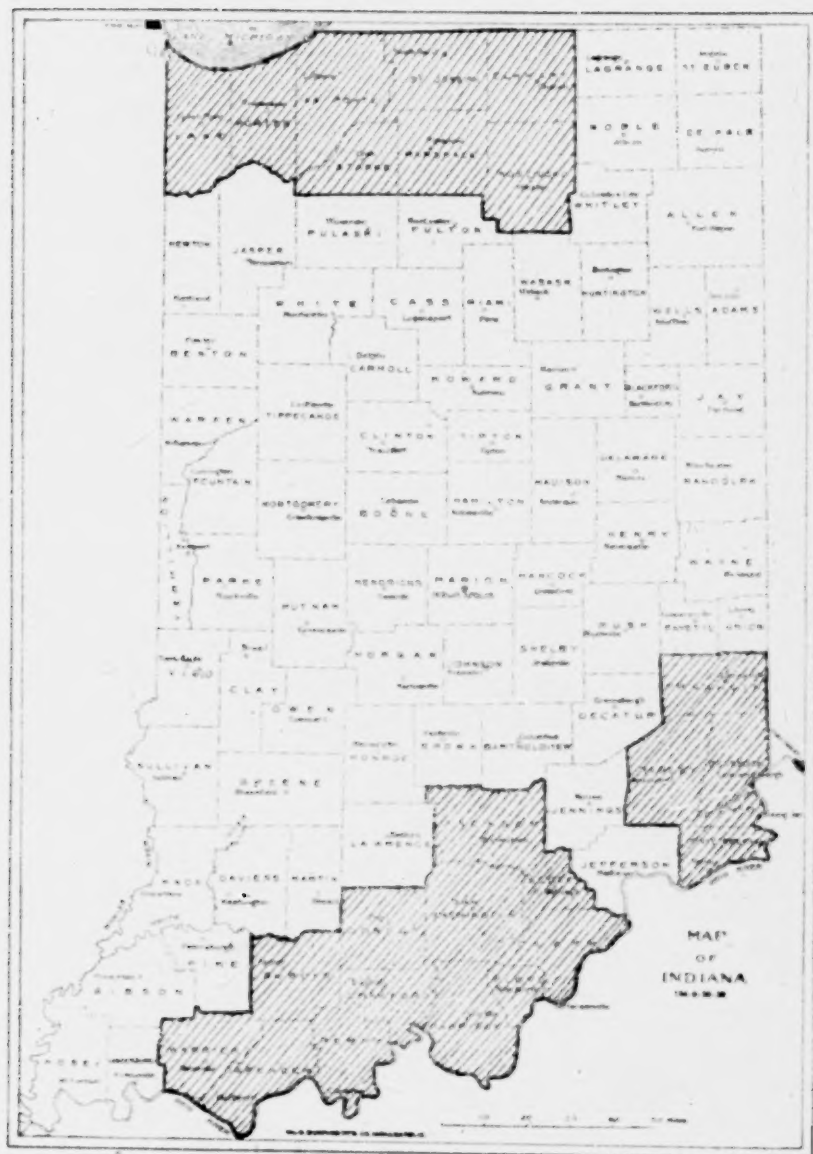
The application of the International Harvester Company case, 221 Ind. 416, places the source of the income outside the state, and renders non-taxable the income so derived. Any other construction would be to project the

powers of Indiana beyond its borders and to tax an interstate transaction. *McLeod v. J. E. Dilworth Co.*, 64 Sup. Ct. Rep. 1023, No. 311, decided May 15, 1944.

MERLE H. MILLER,
Counsel for Petitioner.

JAMES A. ROSS,
Of Counsel.

APPENDIX A



Class A sales involved in this case were made only in the shaded areas. Sales to dealers in other portions of Indiana were made through a branch at Indianapolis, and the application of the tax is not questioned in this case.



FILE COPY

1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 75

FORD MOTOR COMPANY,

Petitioner,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, ET AL.,
ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL MEMORANDUM

MERLE H. MILLER,
Counsel for Petitioner.

JAMES A. ROSS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 75

FORD MOTOR COMPANY,

vs.

Petitioner,

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M.
ROBERTSON, AND FRANK G. THOMPSON, AS AND
CONSTITUTING THE DEPARTMENT OF TREASURY OF THE STATE
OF INDIANA,

Respondents

PETITIONER'S SUPPLEMENTAL MEMORANDUM

on the

Application of the Spector Case

In the case of *Spector Motor Service Inc. v. Charles J. McLaughlin, Tax Commissioner*, this Court remanded the cause to the District Court with instructions that the parties obtain a determination from the State court as to the proper interpretation of the State Statute and applicable provisions of the State Constitution. The District Court and the Circuit Court of Appeals had reached divergent views as to the construction of the state statute, and the act in question had not been considered by the State courts. Before considering all the possible United States Constitutional questions that might arise from various interpreta-

tions of the State statute, this Court desired to know just what interpretation the State Court would adopt.

In the present case this Court is not called upon to decide constitutional issues, but only to determine whether the lower courts properly followed the principles established by the State Court in the case of *Department of Treasury v. International Harvester Co.* (1943), 47 N. E. 2nd 150. Petitioner has cited the case of *McLeod v. Dilworth*, 64 Sup. Ct. Rep. 1023, to show that the application of the Indiana tax to these transactions would violate the Commerce Clause, but since that point was not among the errors assigned, such discussion is merely an aid in interpreting the Indiana Statute which should be construed in such manner as to render it constitutional if possible.

This case then is purely one based upon diversity of citizenship so far as this proceeding is concerned, and we are not asking this Court to decide Constitutional questions which might never arise. The basic reason given for the action taken in the *Spector* case therefore is not present here.

Further, petitioner is not asking for a construction of a new State Statute that has not been considered by Indiana State Courts. A great multitude of questions have been raised and decided in the more than a score of decisions already handed down by the Indiana Supreme Court, involving the Gross Income Tax Act. The nature of the tax was determined in *J. D. Adams Manufacturing Co. v. Storen*, 212 Ind. 343, 7 N. E. 2nd 941, which definition was used by this Court in reaching decisions in the cases of:

J. D. Adams Manufacturing Co. v. Storen, 304 U. S. 307;

Treasury v. Wood Preserving Corporation, 313 U. S. 62;

International Harvester Co. v. Treasury, 321 U. S. —

The State Court has spoken many times with regard to this statute, and with respect to the present controversy has said that income was not derived from "sources within the State of Indiana" by a non-resident who sold products to Indiana dealers, where delivery was made to a carrier outside the State, with reservation of title in the non-resident seller until payment of the purchase price, *Treasury v. International Harvester Co.* (1943) 47 N. E. 2nd 150.

The question presented to the District Court was whether that *principle* was applicable in this case where the contract was likewise accepted outside the State, and delivery was made to an authorized agent of the dealer outside the State, which agent assumed full responsibility for the purchase price, (R. 56), with retention of title in the non-resident seller until payment in full.

If the Federal courts are to exercise their intended function with respect to cases where jurisdiction rests on diversity of citizenship, those courts must be permitted to apply *principles* to differing sets of facts. True, the Federal Court must look to State Court decisions for those principles, but having found some principles, the Court should be permitted to exercise the customary judicial function of deciding the case. The right of a non-resident to sue in the Federal Courts becomes a dead letter if he must get a decision from the State Court in his case before the Federal Court can act.

Since the Supreme Court of Indiana has determined when income is exempt from tax because it was not derived from sources within the State, this Court should determine whether the income in the present case was derived from sources within the State to any different degree than prevailed in the *International Harvester* case. Ford did no more with respect to these Class A sales within the State

of Indiana that could be regarded as a source of income in this case, than International Harvester did with respect to the Class A sales in the case decided by the Indiana Supreme Court.

MEBLE H. MILLER,
Counsel for Petitioner.

JAMES A. ROSS,
Of Counsel.

(5485)



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DEC 18 1944

CHARLES ELMORE OGDEN
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

No. 75

FORD MOTOR COMPANY,

Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and Constituting the Department of Treasury of The State of Indiana,

Respondents.

**PETITIONER'S REPLY TO
RESPONDENTS' MEMORANDUM**

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Indianapolis, Indiana.

JAMES A. ROSS,
Of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

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DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and Constituting the Department of Treasury of The State of Indiana,

Respondents.

**PETITIONER'S REPLY TO
RESPONDENTS' MEMORANDUM**

The jurisdiction of the District Court of the subject matter involved in this litigation has never been questioned until now. In response to this belated contention, it is only necessary for petitioner to point out that the complaint clearly sets forth a real and substantial controversy under the Federal Constitution (R. 2, Par. 2 at bottom of page). Respondents totally disregard the allegations of the complaint and assume that if the Federal questions involved

in the controversy are decided against the plaintiff, all jurisdiction is then lost. Of course, such is not the case for jurisdiction is dependent upon the initial involvement of a Federal question, not upon tenability of plaintiff's view or the ultimate decision adverse to that view. As to jurisdiction, where a complaint sets forth a real and substantial controversy under the Federal Constitution and also involves state questions, this Court has held.

"This being so, the jurisdiction of that Court extended, and ours on appeal extends, to a determination of all questions involved in the case, including questions of state law, irrespective of the disposition that be made of the Federal question, or whether it be found necessary to decide it at all." (*Greene v. Louisville & I. R. Co.* (1917), 244 U. S. 499.)

See also:

Mosher v. City of Phoenix (1932), 287 U. S. 29;

Columbus Ry, etc. v. Columbus (1919), 249 U. S. 399;

North American Cold Storage v. Chicago (1908), 211 U. S. 306;

Pacific Electric R. Co. v. Los Angeles (1904), 194 U. S. 112;

Doherty v. McAuliffe (1935), 74 Fed. 2d 800, certiorari denied 294 U. S. 730;

1 Encyclopedia of Federal Procedure (2nd Ed.), p. 420.

It is true that the District Court decided all Federal questions involved in the complaint against petitioner, and it is true that the Circuit Court of Appeals likewise decided

all Federal questions against petitioner, but at the same time both courts had jurisdiction to and did decide a state question contrary to the applicable decisions of the state court. Because of the decision in that respect, petitioner requested certiorari on that precise ground. Unless it is to be said that when Federal questions are defeated, Federal courts lose all jurisdiction (to the contrary see *Railroad Commission of Cal. v. Pacific Gas & Elec. Co.* (1937), 302 U. S. 388) petitioner is entitled to a decision of this Court on the merits of its claim under state law, for jurisdiction having validly attached, it continues as to all questions involving the controversy, not only Federal but other questions within the legitimate scope of the controversy. (See collection of authorities in *Railroad Commission of Cal. v. Pacific Gas & Elec. Co.* (1937), 302 U. S. 388.) See also *Silver v. L. & N. Ry. Co.* (1909), 213 U. S. 175.

Respectfully submitted,

MERLE H. MILLER,

Counsel for Petitioner.

JAMES A. ROSS,
Of Counsel.

U. S.
MAY 22 1944
THOMAS ALMOND COOPLY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1943


No.  75

FORD MOTOR COMPANY,
Petitioner,

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DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M.
ROBERTSON and FRANK G. THOMPSON, As and
Constituting the Department of Treasury of the State
of Indiana,
Respondents.

**BRIEF FOR THE RESPONDENTS OPPOSING THE
PETITION FOR WRIT OF CERTIORARI**

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The Attorney General of Indiana,
WINSLOW VAN HORN ,
JOHN J. McSHANE,
Deputies Attorney General of Indiana,
Attorneys for Respondents.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1943

FORD MOTOR COMPANY,

Petitioner,

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DEPARTMENT OF TREASURY OF THE STATE
OF INDIANA, M. CLIFFORD TOWNSEND,
JOSEPH M. ROBERTSON and FRANK G.
THOMPSON, As and Constituting the
Department of Treasury of the State
of Indiana,

Respondents.

No. 958

**BRIEF FOR THE RESPONDENTS OPPOSING THE
PETITION FOR WRIT OF CERTIORARI**

OPINION BELOW

The United States District Court for the Southern District of Indiana, Indianapolis Division, delivered no opinion; its final decree is found at (R. 82). The opinion of the Circuit Court of Appeals of the United States for the Seventh Circuit (R. 98-103) is reported in 141 Fed. (2d) 24.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered on March 4, 1944 (R. 98). The Petition for a Writ of Certiorari was filed on May 3, 1944, and was served on respondents on May 4, 1944. The jurisdiction of this court rests on section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U.S.C.A. 347.

QUESTIONS PRESENTED

The petitioner manufactured and sold motor vehicles to dealers within the State of Indiana and was assessed for Indiana gross income tax upon the transactions. The petitioner paid such tax and now sues for a refund under the provisions of the taxing act. The questions are:

1. Whether the errors specified in the petition can be properly urged where they were not presented in the petition filed with respondents for refund as required by the statute.

2. Whether the receipts so taxed were taxable under a statute taxing the receipts of a non-resident from sources within Indiana, particularly under the decision of the Supreme Court of Indiana in *Department of Treasury v. International Harvester Company* (1943), 47 N.E. (2d) 150.*

3. Whether a decision by an employee of the Department, made during the pendency of this cause, constituted an account stated between the parties.

* A copy of this decision is set forth as Appendix C, *post*, p. 31. As to Class C, D & E Sales, it was affirmed May 15, 1944 (12 U. S. Law Week, 4367), — U. S. —.

STATUTES INVOLVED

1. The first question above stated turns upon a construction of section 14(a) of the Indiana Gross Income Tax Law of 1933 as amended in 1937 which is set out in Appendix A, *infra*, pp. 26 to 28.

2. The second question presented, *supra*, involves taxes for the years 1935, 1936 and 1937. As to the first two years, this question involves a construction of section 2 of the Gross Income Tax Act of 1933 which is set out in Petitioner's Brief in Appendix A at page 28. As to 1937, the question involves an interpretation of such section 2 as amended in 1937, which amended section is set forth in Petitioner's Brief in Appendix A at pp. 29-30.

Incidental to the determination of this question, reference is made to the Uniform Sales Act as adopted in Indiana, the pertinent section being set out in Appendix B, *infra*, pp. 29-30.

STATEMENT

Upon petitioner's original (R. 2) and supplemental (R. 26) complaints and respondents' answers thereto (R. 11 and 31) the court stated its Findings of Fact (R. 41). The evidence in the cause has not been brought into the record (R. 90). Upon these Findings, the court stated its conclusions of law (R. 81) and rendered judgment for the respondents (R. 82) which judgment was affirmed by the Circuit Court of Appeals (R. 98-103).

The pertinent facts contained in the Findings of the court may be summarized as follows:

1. *This Litigation*.—On July 1, 1938, the respondent, Department of Treasury of the State of Indiana, pursuant

to the Indiana Gross Income Tax Act made a proposed assessment upon the petitioner (R. 63). After due protest (R. 65) and final assessment (R. 65) petitioner paid such assessment (R. 65). Within the time and under the procedure specified by section 14 of the Indiana Gross Income Tax Act (Appendix A, *infra*, p. 28) petitioner filed with respondents a petition for refund of the taxes so paid (R. 66), which petition was in proper form (R. 68) and in which petition petitioner specifically stated the reasons for its such claim as follows (R. 66):

"(1st) That the receipts were from commerce between the states, and under Section 8, Article I of the Constitution of the United States, the tax was void;

"(2) That the receipts were from transactions completed outside of the State and were not taxable under Section 1 (m) of the Gross Income Tax Act as amended, nor under Regs. 191 and 193 under the 1933 Act, and further, if such receipts were taxable, then the Act was in conflict with the Fourteenth Amendment to the Constitution of the United States;

"(3rd) All of the tax assessed on Class A sales for the year 1935 and that portion of tax for the year 1936 collected for the first three quarters was not assessed 'at any time within two years after the time when the return covering such gross income was filed, and after due notice by registered letter, to the taxpayer,' and such assessment for the aforesaid periods was therefore void. Plaintiff's refund petition also set forth as Exhibits schedules demonstrating certain errors in the original audit figures of the figures of the defendants which were attached to the notice of proposed assessment of July 1, 1938."

Thereafter, on June 7, 1939, petitioner filed its complaint in this cause for such refund. The complaint alleged the above facts and after alleging the method by which it did business stated as its grounds for recovery in regard to Class A sales (R. 7-8) that the taxation of such receipts was prohibited by the commerce clause of the Constitution of the United States; that such receipts were derived from activities, business and sources outside the State of Indiana under the provisions of section 2 of the Gross Income Tax Act of 1933 and as amended in 1937; and that if construed to be taxable under the Gross Income Tax Act then the Act is in violation of the Fourteenth Amendment of the Constitution of the United States. To this complaint the respondents addressed an answer of admission and denial (R. 11-35).

On October 27, 1941, the petitioner filed an amendment of and supplement to their complaint, amending Paragraph I of their complaint in one particular (R. 26-27) and adding a second paragraph of complaint (R. 27-30) which second paragraph alleged that after the filing of this cause the parties agreed to a review of the decision upon the claim for refund theretofore filed, and that for that purpose petitioner filed with the respondents a request for reconsideration and that respondents acquiesced in such request for reconsideration and upon reconsideration agreed with the petitioner that the transactions taxed were not taxable and notified petitioner that the claim for refund had been allowed; that petitioner acquiesced in such allowance and ruling and that by reason of such allowance and acquiescence an account was stated between the parties. To this amended and supplemental complaint the respondents filed answer (R. 31-39) denying any account stated and setting

up additional facts concerning the negotiations between the parties.

The cause was referred to a special master (R. 40) who made report which was adopted by the court as its Findings of Fact (R. 40).

2. *The Contract between the Petitioner and Its Dealers in General.*—Each dealer to whom the petitioner sells its products enters into a contract with the petitioner the form of which is set forth in the Findings of Fact (R. 43-49). By this contract the petitioner agrees to sell and the dealer agrees to purchase petitioner's products F.O.B. Detroit, Michigan, at the prices from time to time determined by the company. Sales are to be, upon a cash basis only and it is expressly provided that full payment precede delivery (Clause 2, R. 44), and that title remain in petitioner until the price is paid (Clause 6, R. 45). In addition to the payments specified, the company is permitted to add an amount determined by it for freight, packaging and other handling expense and any taxes imposed by the dealer's state (R. 44). The dealer agrees to comply with the company's requirements in the operation of its business and its method of selling to the consumer. The method of ordering is specified (R. 46-47), provision is made for termination (R. 47-48), construction of the contract is to be by the law of Michigan (R. 48), assignment without consent is forbidden (R. 48), modification variance or cancellation is prohibited except by instrument in writing executed by certain executive officers of the petitioner (R. 48), and it is agreed that the contract states the full agreement between the parties (R. 48).

3. *Specific Provisions of the Contract upon Which Respondents Rely.*—The contract (Clause 2, R. 44) specifically provides:

"Payment by dealer is to be in cash before delivery, or by paying sight draft attached to Bill of Lading, including exchange."

The contract further provides (Clause 6, R. 45):

"Title to all company products until actually paid for by dealer shall be and remain in company; but regardless of title remaining in company or having passed to dealer all shipment shall be at dealer's risk from the time of delivery to carrier at place of shipment; * * *

Clause 9 (h) provides (R. 48):

"The terms of this agreement may not be enlarged, varied, modified or cancelled by any agent or representative of company, except by an instrument in writing executed by the President, Vice-President, Secretary or Assistant Secretary of company and company will not be bound by any alleged enlargement, variation, modifications, or agreement not so evidenced."

4. *Petitioner's Manufacturing and Sales Organizations*.—Petitioner is a Delaware corporation (R. 41). It is engaged in the business of manufacturing motor vehicles with a plant and principal place of business at Dearborn, Michigan, and assembly plants *inter alia* at Chicago, Illinois, Cincinnati, Ohio, and Louisville, Kentucky (R. 42). The plant at Dearborn, Michigan, manufactures the parts *i. e.* motors, chassis, wheels, fenders, bodies, etc., which are then shipped to the assembly plants (one assembly plant is also maintained at Dearborn) where manufacture of the motor vehicle is completed by the assembling, painting and processing of these parts (R. 61).

The assembly plants also operated as regional sales agencies with territories that in the instant case overlap state boundaries. No assembly plant is located in Indiana (R. 42, 43), but petitioner maintains at Indianapolis a branch for storage and distribution, this branch being allotted a territory in the central part of Indiana, the remainder of the state being divided among the out-of-state assembly plants (R. 49-50).

5. *Method of Ordering.*—The dealers place a preliminary order with the branch to which they are assigned, by mail, by the tenth of each month. From these orders petitioner makes up production schedules, allots the units and prepares shipping schedules (R. 50-51).

Dealer's order contains a detailed specification of the type of vehicle, color, body, upholstery, and special equipment and the units are manufactured specifically according to such orders at the assembly plant (R. 50-51).

6. *Delivery of the Units.*—When manufacture has been completed at the assembly plant and the unit tested and checked against the invoice it is delivered to the dealer or a carrier at the gate of the assembly plant (R. 52). The Class A sales here involved were all delivered to the truckaway companies and none were delivered to the dealer (R. 63-64). The employees of the truckaway company signed the invoice as agent of the dealer without specific authority but as a matter of custom known to the dealer (R. 52-53).

7. *Payment by the Dealers.*—In regard to Class A sales the dealer paid the purchase price to the truckaway company in cash upon delivery by the truckaway company at the dealer's place of business in Indiana; or by executing finance papers to a finance company, where by pre-

arrangement the finance company agreed to pay the petitioner the cash represented by such finance papers; or by a combination of cash and finance papers. All such cash and finance papers were delivered to the truckaway company at the dealer's place of business in Indiana and were delivered by them to the petitioner at its out-of-state assembly plants (R. 63-64).

The finance papers are in the form of trust receipts reciting that a security interest has passed to the finance company (R. 54). Both the truckaway and finance companies were independent of the petitioner and the dealers. The truckaway companies were contract carriers until 1937 and common carriers thereafter.

8. *Retention of Control during Shipment.*—The petitioner exercised its right of title and possession during shipment by diverting deliveries a great many times, during the entire course of assembly and shipment and up to the time of final payment by and delivery to the dealer at his place of business in Indiana (R. 57-58). In such instances, the petitioner would direct delivery to another dealer even during or at the termination of transit and would re-bill the unit to such other dealer.

9. *Ultimate Facts Stated by the Court.*—Upon these facts the court stated the ultimate facts that these units were delivered by petitioner to its Indiana dealers in the State of Indiana (Finding 17, R. 78); that the truckaway companies acted as agents of the dealers where they signed finance papers on their behalf; as agents of the petitioner in transmitting collections from the dealers to petitioner; and as carriers in the transportation of the goods, and that the receipts from such sales were derived from sources in Indiana from the sale and transfer of the goods which were delivered to the purchaser in Indiana.

10. *The Facts Concerning the Account Stated.*—While this cause was pending in the trial court pursuant to conversations between counsel, petitioner requested a re-hearing upon its petition for refund theretofore filed with the respondents (R. 68). Pursuant to such request counsel and one, Elmer F. Marchino, an employee of respondents, designated as a hearing judge to hear such matters, made a further investigation of the facts (R. 69) and pursuant to such request for a re-hearing and the investigation thereon the Hearing Judge executed and mailed to petitioner a letter which appears on pages 73-75 of the record and which may be summarized as follows: It is stated that the request for reconsideration was based upon the contention of the petitioner that the transaction concerning the sale of petitioner's motor vehicles,

“At points outside of the State of Indiana and there delivered to Indiana customers within the territorial limits of that outside branch or assembly plant constituted a transaction completed in its entirety outside of the State of Indiana and thus did not fall within the purview of the Gross Income Tax Act.”

The facts upon which the decision was made are stated to be that the Indiana dealers or their authorized agents take delivery at the out-of-state assembly plant under conditions whereby petitioner at the time of delivery is paid for the products either in cash or by appropriate financing and does not have the obligation or responsibility to make delivery into Indiana or to initiate the transportation into Indiana, but on the contrary that petitioner's entire responsibility ceases at the time of delivery of the products at the assembly plant outside the state.

It was then held that *such transactions* are completed at a business situs entirely outside of the State of Indiana and are not transactions in interstate commerce and that a refund will be made thereon.

Following this decision various conversations and negotiations were had between counsel, court and employees of the Department and, pursuant to the directions in the decision that the Department take the necessary steps to make refund, an audit was made by the respondent (R. 77) by which audit the Department found that the transactions mentioned in the decision amounted to \$10,267.45 upon which petitioner was entitled to a refund of \$25.67 which was paid and accepted without prejudice to the rights of the parties (R. 77, Finding 14).

Upon these facts the court made the ultimate finding that respondent did not at any time promise to refund \$78,514.10 (being the tax on *all* Class A sales) or any other specifically stated amount, and that no certificate of over-assessment was ever issued by respondents (R. 77, Finding 15).

11. *Conclusions of Law.*—Upon these facts the court concluded *inter alia* that no account stated arose between petitioner and respondents, that the tax assessed and collected under Class A transactions is not prohibited by the Constitution of the United States and was lawfully assessed and collected and that the law is with the respondents and against the petitioner (R. 81).

12. *Decision of the Circuit Court of Appeals.*—This cause being submitted to the Circuit Court of Appeals solely upon errors arising out of the court's conclusions of law (R. 98), the court quoted the Findings of Fact referring particularly to Class A sales (being Finding No. 10,

R. 63, and Finding 17 (B), R. 79-80), and held that from these Findings it is clear that all transactions in Class A sales took place in Indiana except the manufacture, assembling, and shipment of the goods and the receipt of some orders and distinguished *Department of Treasury v. International Harvester Company*, 47 N. E. (2d) 150, upon the ground that in the Class A sales in that case the articles were accepted and paid for outside of Indiana, while in the case at bar they were accepted and paid for in Indiana (R. 101). To this conclusion Lindley, D. J., dissented.

The court further held that no account stated arose between the parties. In this regard the opinion was unanimous.

SUMMARY OF ARGUMENT

A.

The Indiana Gross Income Tax Act requires, as a condition precedent to this statutory action for a refund, that the petitioner shall have filed a petition with respondent for such refund stating the reasons for its claim. The petitioner did not include the grounds of the petition for a writ of certiorari as reasons in its petition for a refund. Therefore it cannot assert such grounds in this court.

B.

The law of Indiana, particularly as expressed in *Department of Treasury v. International Harvester Company* (1943), 47 N.E. (2d) 150, is that receipts received from the sale of goods are received from a source within the state, if the property in the goods passes to the buyer within the state. In the case at bar petitioner, by contract, expressly postponed delivery and transfer of title until

full payment was received from the buyer. Petitioner exercised control over the goods during shipment by diverting deliveries a great many times and by permitting the buyer to refuse delivery. Under the law of Indiana the property in the goods did not pass to the buyer under these circumstances, until the goods were received and paid for by the buyer within the state. The receipts were, therefore, received from a source within Indiana and were taxable under section 2 of the Gross Income Tax Law.

No Constitutional or Federal questions are presented.

C.

The Circuit Court of Appeals correctly stated the facts and no cause is shown for the exercise of the supervisory power of this court.

D.

The alleged account stated claimed by petitioner is predicated upon an opinion written by a hearing judge who has no statutory authority. On the contrary the law specifically provides that no document shall constitute the official act of the Department unless it is signed by the Director. The authority of public officials in Indiana is limited to that conferred by law. Therefore, no valid assent was given by the Department to any account stated.

If the Letter of Findings be construed as the act of the Department yet the finding was expressly limited to those instances where full payment was received by petitioner outside of the state at the time of delivery. Subsequent to the issuance of this opinion an audit was made by the respondent of the sales so described in the opinion and the erroneous tax disclosed by such audit was refunded to the petitioner.

ARGUMENT

A.

The Specifications of Error stated in the Petition for Certiorari are based upon grounds not stated in Petitioner's Claim for Refund and cannot be urged in this action.

The Indiana Gross Income Tax Act, section 14 (Appendix A, *post*, p. 21), permitting the taxpayer to sue for refund, provides:

"In such petition, he shall set forth the amounts which he claims should be refunded, and the reasons for such claim."

and as to suits for refund that:

"* * * no court shall entertain such a suit, unless the taxpayer shall show that he has filed a petition for refund with the department as hereinabove provided, * * *."

Suits for refund under the above section, including the present action, are suits against the State of Indiana in its sovereign capacity, although in form they appear to be suits against a department of the State. *Shoemaker v. Board of Commissioners* (1871), 36 Ind. 175, 186. The State cannot be sued without its consent and if terms are imposed by the statute giving consent, plaintiff must bring himself within such terms. *State of Indiana v. Mutual L. Ins. Co.* (1910), 175 Ind. 59, 71. The taxpayer seeking to recover from the State must strictly pursue the remedy granted. *Shoemaker v. Board of Commissioners* (1871), 36 Ind. 175, 188; *Maas & Waldstein Co. v. U. S.* (1930),

283 U. S. 583, 589; *Paul, Federal Estate and Gift Taxation* (1st ed., 1942), p. 915. The statutory requirement as to stating reason for refund cannot be waived although a similar provision when contained in an administrative regulation is subject to waiver. *U. S. v. Garbutt Oil Co.* (1938), 302 U. S. 528, 533. This act limits the power of the state's officers in granting refunds and those dealing with such officers are charged with knowledge of such limitation of power. *State v. Tiesburg Land Co.* (1915), 61 Ind. App. 555.

With these principles in mind we turn to the facts of this case. While the court below held that the claims for refund filed by the petitioner was in proper form (R. 68) the court at the same time specifically stated the grounds urged in the claim for refund (R. 66). These two findings must be read together and they establish the fact that as to Class A sales the claim for refund stated three reasons for non-liability. The first and third concerned interstate commerce and the statute of limitations, respectively, and the second claimed a refund for the reason "that the receipts were from transactions completed outside of the State and were not taxable under Section 1 (m) of the Gross Income Tax Act as amended, nor under regulations 191 and 193 under the 1933 Act, and further, if such receipts were taxable, then the Act was in conflict with the Fourteenth Amendment to the Constitution of the United States" (66).

Section 1 (m) of the Gross Income Tax Act of 1937 and Regulations 191 and 193 under the 1933 Act are contained in Appendix A at pages 29 to 31 of petitioner's brief. Such Section 1 (m) concerns only Indiana corporations and residents having gross receipts from a trade or business situ-

ated and regularly carried on at legal situs outside the state while in the case at bar petitioner urges as error that the decision of the court below misconstrued the decisions of the Indiana Supreme Court relating to Section 2 of the Act, which concerns the source of the receipts of non-resident corporations.

It has been expressly held that the tax levied by Section 2 against non-residents is distinct and different from the tax levied by Section 2 upon residents. *Department of Treasury v. Wood Preserving Company* (1941), 313 U.S. 62, reversing 114 Fed. (2d) 922, which held to the contrary. Regulations 191 and 193 also mentioned in the claim for refund are concerned with the right of the State of Indiana to levy a tax upon activities carried on by residents entirely without the State of Indiana and not with the question as to whether Indiana actually did levy a tax under Section 2 which was the question decided in the case of *Department of Treasury v. International Harvester Company* and which is the question which petitioner now seeks to present.

The statute in question clearly states that a condition precedent to this action is that plaintiff file a claim for refund *setting forth the reasons* for such claim. The record shows that the reasons set forth in the claim for refund are expressly based upon a different section of the statute than the reasons now urged and although the reasons are similar they are not identical. The audits of the Department under the two sections would set forth different figures and have a different approach.

Petitioner, not having stated the reasons it now urges, does not present a case against the State of Indiana, which

has not consented to be sued upon any other ground than that stated in the claim for refund.

In regard to specification of error number 3 upon the theory of account stated, the record clearly shows that the alleged account stated arose subsequent to the filing of this action (R. 68-77) this matter of an account stated was never at any time submitted to the Department as the reason for a refund, and the State has not given its consent to be sued upon that cause of action. There is no showing or semblance of a showing in the record that the petitioner has performed the statutory condition precedent by stating this claim in a petition for refund as a reason for such refund.

For the reasons so stated respondent urges that the specifications of error stated in the petition for the writ of certiorari were not properly presented to the trial court and cannot therefore be presented to this court.

B.

Under the law of Indiana the gross receipts of petitioner were received from a source within Indiana.

Under specifications 1 and 2 the petitioner argues that the decision of the court below is erroneous because the gross receipts were not received from a source within Indiana and that it is contrary to the decision in *Department of Treasury v. International Harvester Company* (1943), 47 N.E. (2d) 150.* The questions presented by these two specifications are so similar as to be best treated together for the part of the *Harvester* decision upon which

* A copy of this decision is set forth in Appendix C, *post*, p. 31. As to Class C, D & E Sales, it was affirmed May 15, 1944 (12 U. S. Law Week, 4367), — U. S. —.

petitioner relies concerns the question as to whether the particular receipts in that case were from a source within Indiana.

The *International Harvester Company* case concerns four distinct types of sales. Petitioner refers only to the Class A sales therein mentioned. A comparison of the facts involved in the four classes of sales shows that wherever the seller made delivery of the goods to the buyer in Indiana the court held that the receipts were received from a source within Indiana. This is best exemplified by Class D sales, for there the selling branch and purchaser, were non-residents of Indiana. The contract of sale was negotiated outside Indiana and the only act which occurred in Indiana was the delivery of merchandise. It was held that the source of the receipts was in Indiana.

Under its description of Class A sales (Appendix C, *post*, p. 31) the court expressly states that the shipment from the out-of-state seller to the purchaser was without the purchaser's direction. This Statement negatives the existence of any requirement in the contract of sale necessary to bring those sales within rule 5, § 19, of the Uniform Sales Act as adopted in Indiana (Burns' Ind. Stat., 1943 Replacement, 58-203, Rule 5, Appendix B, *post* p. 29). Such sales would not then be excepted from, but would be governed by Rule 4 (a) of such section and the property in the goods passed at the place of shipment. The converse of that situation is contained in Class E in the *International Harvester* case where the contracts required shipment into Indiana. This brought the sale under Rule 5 of such Section (Appendix B, p. 29) which provides that, where delivery to the buyer is so required, the property in the goods passes at the destination.

Thus, the true rule of the *International Harvester* case is that the source of the receipts from the sale of goods is at that place where the property in the goods passes to the buyer. Applying this rule to the case at bar, we are confronted with the facts that the contract between the parties expressly provides that: "Payment by dealer is to be in cash before delivery," (R. 44) and "Title to all company products until actually paid for by dealer shall be and remain in company;" (R. 45). These facts are very ssimilar to those in *Gaar, Scott & Co. v. Fleshman* (1906), 38 Ind. App. 490, 77 N.E. 744, where the court held that the property in the goods did not pass until delivery to the buyer. Under the above rule in the *International Harvester* case these transactions are taxable.

The petitioner relies upon certain acts occurring in the performance of the contract as being conclusive of the fact that delivery occurred outside the State of Indiana. Each of these will be discussed as a separate element.

1. The dealer was to pay the freight. This was also an element in the case of *Gaar, Scott & Co. v. Fleshman* (1906), 38 Ind. App. 490, *supra*, where the court held that the property in the goods did not pass until they reached the purchaser.

2. The goods were shipped C.O.D. This element was also present in *Gaar, Scott & Co. v. Fleshman, supra*.

3. The goods were shipped F.O.B. Detroit, Michigan. This provision is under the clause of the contract headed "Prices and terms". (R. 44.) It could not operate as a designation of the place of delivery, as the manufacture of the goods was not completed until the goods were ready to leave the assembly plants at Chicago, Louisville and

Cincinnati. This clause pertained wholly to prices and not at all to delivery. Detroit was merely a basing point in a pricing system that avoided the necessity of specifically scheduling prices at each dealer's place of business.

Not only did the contract provide for the retention in the seller of possession and title but the petitioner actually exercised this right of ownership upon many occasions by diverting deliveries in the course of transit, (R. 57, par. n, 4.) Likewise, Petitioner permitted the dealers to refuse delivery (R. 57). Under all of these facts the court below correctly stated that the goods were delivered in Indiana by the petitioner and when the carrier collected the balance due upon the purchase price it collected it as the agent of the consignor, petitioner herein. The court further correctly held that where such delivery is made in Indiana the decision in *Department of Treasury v. International Harvester Company* (1943), 47 N.E. (2d) 150, compels a decision that the source of petitioner's receipts was in the State of Indiana.

No question is raised herein as to the power of the State of Indiana to tax nor as to any constitutional inhibitions against taxation of these receipts. The sole question is: Did Section 2 of the Indiana Gross Income Tax Law purport to tax petitioner's receipts in Class A sales? The decision of the Circuit Court of Appeals in the affirmative was required by *Department of Treasury v. International Harvester Company* (1943), 47 N.E. (2d) 150.

The court below did not depart from the accepted and usual course of procedure so as to require the exercise of the supervisory power of this court.

Petitioner points to certain alleged inaccuracies in the opinion of the Circuit Court of Appeals and maintains that they are such grave mis-statements of the record as to require the exercise of the supervisory power of this court.

Petitioner's first complaint points out the statement by the court (R. 100) that the receipt of some orders took place in Indiana. Petitioner then calls attention to Finding No. 8 (R. 50) where it is stated that the orders are forwarded by the dealer to the branch of the company to which he is assigned. If this statement by the court below is applied only to the Class A sales it is in error, but the appeal to the Circuit Court concerned both Class A sales and Class B sales. In the Class B sales the order was sent to the Indianapolis branch (R. 64). In any event, the place where the order is given or directed is immaterial under a proper interpretation of *Department of Treasury v. International Harvester Company* (1943), 47 N. E. (2d) 150, which is the question before this court in regard to such statement.

Petitioner further complains that the Circuit Court of Appeals did not disclose in its opinion the further alleged fact that the goods were delivered to the dealer or the dealer's agent outside the state, citing (R. 52). The finding upon page 52 refers generally to the practices of the petitioner in all types of sales made by it. The Circuit Court of Appeals, having before it only Class A sales at the time of its decision, correctly referred to the findings of the

court upon pages 63-64 of the record—dealing specifically with that class of sales (R. 99). This class of sales is restricted to those sales where payment was made to the truckaway company upon delivery in Indiana either in cash or by finance papers and no deliveries to the dealers outside the state are involved.

Throughout its Statement of Facts and brief the petitioner attempts to substitute for the court's specific findings directed particularly to the Class A sales certain general findings as to the petitioner's method of doing business in all types of sales. In its specific findings as to the procedure in Class A sales the trial court's attention was focused directly upon the facts concerning such sales. Such direct, specific facts should not be confused by reference to a generalization of all the diverse selling methods of a large business corporation and the statement of the Circuit Court of Appeals is not only correct but is compelled by the record and by the decisions herein cited.

D

No account was stated between the parties regarding the tax on Class A Sales.

The powers of all state officers in Indiana are limited to those powers expressly or impliedly conferred by law and all persons dealing with such officers must take notice of the source of such officers' authority. *Julian v. State* (1890), 122 Ind. 68, 73.

Any account stated must rest in contract and no contract with the state may arise unless the officer who made it had statutory authority for that purpose. Petitioner

cites no such statutory authority and a careful reading of the Indiana Gross Income Tax Act discloses none.

Although Mr. Marchino is denominated a "Hearing Judge" (R. 41), there is no provision in the Gross Income Tax Law or any other law which mentions such an office or grants any power to it. On the contrary, the entire administration of the Gross Income Tax Law is lodged in the "Department" and it is specifically required that all documents must be signed by the "Director" in order to constitute the official act of the Department (Burns' Ind. Stat., 1943 Replacement, Sec. 64-2628, Appendix D, P. 36 *Post*). The decision by Mr. Marchino was not signed by the Director (R. 71, g). It did not, therefore, constitute an official act of the Department but was merely advisory to the Director.

It must be apparent, therefore, that the said officers charged with having contracted the account stated had no authority to make such a contract. Any attempt to do so is void and of no effect.

An account stated (being an agreement between the parties to a current or running account—an assent to an account—that a certain amount is due one of the parties to the account) is not in this case demonstrable. At no time was such an agreement made.

At no time was there an assent to an account.

At no time was a certain amount represented as being due.

It may also be seriously questioned as to whether the taxing authorities had any jurisdiction over this matter at the time of the alleged statement of account with them. Petitioner's claim for refund had been denied and com-

plaint for refund was filed on June 7, 1939. All Acts concerning an account stated occurred after this date. After the filing of the action the jurisdiction was in the court. It can well be doubted that the Legislature intended that the administrative agency retain jurisdiction to hear and decide a matter after it had been properly submitted to a court for decision.

If it were to be conceded that the taxing officials had the power and jurisdiction to contract an account stated, yet, it should seem apparent that none was finally agreed upon. The basis of petitioner's alleged account stated is the letter of findings by Mr. Marchino dated March 1, 1941. This letter of findings related to drive-away sales entirely completed at an out-of-state location. For example, the letter of findings states: "Deliveries of the products desired by Indiana customers are made under conditions whereby the Ford Motor Car Company at the time of the delivery to the customers or the customers' authorized representatives, will be paid for the products, or appropriate financing will be arranged for by the customers or by their authorized agents." The letter of findings previously had stated that delivery to the customer was made out-of-state.

The sales in question, in Mr. Marchino's opinion, were those where the Indiana dealer paid for the car at the out-of-state branch and there took delivery. Under such circumstances the title and dominion there passed to the customer and the petitioner had no property in it when it came to Indiana. Such a finding regarding such sales does not in any manner constitute an agreement regarding the sales here in question, where payment was made on delivery in Indiana of goods then owned and under the dominion of petitioner (R. 64).

The letter of findings referred the file to the Refund Section (R. 75) and, upon audit being made, it was found that sales of the character mentioned in the letter of findings amounted to \$10,267.45, and the tax paid upon this amount has been refunded to petitioner (R. 77, Finding Fourteen).

The most that can be said for petitioner's contention is that Mr. Marchino stated the law and referred the matter to an audit for further development of the facts and figures. Upon development of the facts by the audit, the Department paid according to the letter of findings and refused to pay upon those transactions which did not coincide with those described in the letter of findings.

In conclusion, there is no merit to petitioner's insistence that there was an account stated in this cause of action.

Respectfully submitted,

JAMES A. EMMERT,

The Attorney General of Indiana,

WINSLOW VAN HORNE,

JOHN J. McSHANE,

Deputies Attorney General of Indiana,

Attorneys for Respondent.

APPENDIX A.**Indiana Gross Income Tax Act of 1933, as Amended.****11 Burns Indiana Statutes, (1943 Replacement), § 64-2614.**

Sec. 14. (a) If any person considers that he has paid to the department for any year an amount which is in excess of the amount legally due from him for that year under the terms of this act, he may apply to the department, by verified petition in writing, at any time within three years after the payment for the annual period for which such alleged overpayment has been made, for a correction of the amount so paid by him to the department, and for a refund of the amount which he claims has been illegally collected and paid. In such petition, he shall set forth the amount which he claims should be refunded, and the reasons for such claim. The department shall promptly consider such petition, and may grant such refund, in whole or in part, or may wholly deny the same. If denied in whole or in part, the petitioner shall be forthwith notified of such action of the department, and of its grounds for such denial. The department may, in its discretion, grant the petitioner a further hearing with respect to such petition. Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in any proper action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected: Provided, however, That no court shall entertain such a suit, unless the taxpayer shall show that he

has filed a petition for refund with the department, as hereinabove provided, within one year prior to the institution of the action: Provided, further, That no such suit shall be entertained until the expiration of six months from the time of filing such petition for refund with the department, unless in the meantime, the department shall have notified the petitioner, in writing, of the denial of such petition. Any such petition shall be subject to the provisions of section 11 (b). In every such action, a copy of the complaint shall be served upon the department, with the summons, which summons shall be so served at least fifteen (15) days before the return date thereof. It shall not be necessary for any taxpayer to protest against the payment of the tax in order to maintain such suit. In any suit to recover taxes paid, or to collect taxes, imposed under the provisions of this act, the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

(b) Either party to such suit shall have the right to appeal, as now provided by law in civil cases. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the treasurer in favor of such taxpayer, to pay such judgment, interest and costs. It shall be the duty of the treasurer to honor such warrant and pay such judgment out of any funds in the state treasury not otherwise appropriated.

(c) It shall be the duty of the attorney-general to represent the department, and or the State of Indiana, in all legal matters or litigation, either criminal or civil, relat-

ing to the enforcement, construction, application and administration of this act, upon the order and under the direction of the department.

(d) No injunction to restrain or delay the collection of any tax claimed to be due under the provisions of this act shall be issued by any court, but in all cases in which, for any reason, it be claimed that any such tax about to be collected is wrongful or illegal in whole or in part, the remedy, except as otherwise expressly provided in this act, shall be by payment and action to recover such tax as provided in this section.

APPENDIX B.

Uniform Sales Act as adopted in Indiana

11 Burns' Ind. Stat. (1943 Replacement), Section 58-203.

Rules for ascertaining intention.—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. (1) When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revert the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer:

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20 (§ 58-204). This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon. (Acts 1929, ch. 192, § 19, p. 628.)

APPENDIX C.**IN THE SUPREME COURT OF INDIANA**

DEPARTMENT OF TREASURY OF THE STATE
OF INDIANA, M. Clifford Townsend,
Joseph M. Robertson and Frank G.
Thompson, as and Constituting the
Department of Treasury of the State
of Indiana

v.

Appealed from
the Marion
Superior Court
Room Three

INTERNATIONAL HARVESTER COMPANY and
INTERNATIONAL HARVESTER COMPANY OF
AMERICA

(March 19, 1943)

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by SHAKE, J.

The appellees sued to recover Gross Income Taxes paid to the State of Indiana during the years 1935 and 1936. It was stipulated at the trial that judgment for any amount found due should be in favor of the appellee, International Harvester Company, and that, for the purposes of the case, the appellees should be considered as one party.

The evidence disclosed, without conflict, that the appellees were corporations organized under the laws of other states but authorized to do business in Indiana. They were engaged in the manufacture of farm implements and in the sale of their products both at wholesale and retail. Manufacturing establishments were maintained at Richmond and

Fort Wayne, and selling branches at Indianapolis, Terre Haute, Fort Wayne, and Evansville in this state. There were also numerous manufacturing plants and sales branches in adjoining states and elsewhere. Each branch served assigned territory and in several instances parts of Indiana were within the exclusive jurisdiction of branch offices located without the state.

The trial court determined the tax liability of the appellees under four factual situations, designated as Classes A, C, D, and E. The nature of these transactions may be stated as follows:

CLASS A: Sales by branches located outside Indiana to dealers and users located in Indiana. These sales were made on orders solicited in Indiana by representatives of out-of-state branches, or upon mail orders sent from Indiana to out-of-state branches. The orders were accepted by the outside state branch offices and the purchase money paid to them. Without directions from the purchasers, the goods were shipped to them in Indiana from branches, warehouses, or factories located outside Indiana.

CLASS C: Sales by branches located outside Indiana to dealers and users residing in Indiana. The orders were solicited in Indiana and the customers took delivery to themselves at the factories in Indiana to save time and expense of shipping.

CLASS D: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state.

CLASS E: Sales by branches located in Indiana to dealers and users residing in Indiana, in which goods were shipped from points outside Indiana to customers in Indiana, pursuant to contracts so providing.

The court below found that the appellees were entitled to a refund of taxes paid upon A, C, and D transactions, but not for those under Class E. By properly assigned errors and cross-errors each of these findings is challenged.

Much of the briefs were devoted to the subject of the interstate attributes of the transactions. We consider these discussions beside the issues. Interstate commerce is not to be exempted from this tax unless it is imposed in such a manner as to lead to the possibility of double or multiple burdens. The Supreme Court of the United States held in *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, 82 L. Ed. 1365, 58 S. Ct. 913, 117 A. L. R. 429, that this tax could not be imposed upon a domestic corporation with its principal office and place of business in this state, for gross income derived from the sale of its products to customers in other states. The court said that, "the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold, as well as those in which they are manufactured. Interstate commerce could thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." In *Department of Treasury v. Allied Mills, Inc.* (1942), Ind., 42 N. E. (2d) 34, we interpreted the Adams case as meaning that the tax may be levied by the buyer's state regardless of the incidental interstate nature of the transaction. This view was sustained by the Supreme Court. *Allied*

Mills, Inc., v. Department of Treasury (1943), — U. S. —,
— L. Ed. —, — S. Ct. —.

Applying the above decisions to the case at bar, it seems clear that transactions under Classes C, D, and E are subject to our Gross Income Tax. Neither of these classes present a possibility of double taxation, since no other state could impose such a burden in view of the conclusions reached in the *J. D. Adams* case.

Class A presents a different problem. Section 2 of Ch. 50, Acts 1933, § 64-2602, Burns' 1933, § 15982, Baldwin's 1934, which was in force during 1935 and 1936, provided:

"Such tax shall be levied upon the entire gross income of all residents of the state of Indiana, and upon the gross income derived from sources within the state of Indiana, of all persons and/or companies, including banks, who are not residents of the state of Indiana, but are engaged in business in this state, or who derived gross income from sources within this state, * * *."

It was beyond the power of the treasury department to broaden the tax base established by this statute by administrative regulations. In *Department of Treasury v. Muesel* (1941), 218 Ind. 250, 254, 32 N. E. (2d) 596, this court said:

"Unless the transaction comes clearly within one of the provisions of this definition it cannot be taxed as gross income. It is a settled rule of statutory construction that statutes levying taxes are not to be extended by implications beyond the clear import of the language used, in order to enlarge their operation, so as to embrace transactions not specifically pointed out. In case of doubt such stat

utes are to be construed more strongly against the state and in favor of the citizen."

The appellants would have us construe the statute as exempting only income derived *entirely from activities* outside of Indiana. This would distort the clear import of the language employed and violate the rule stated above. Under Class A the orders upon which the goods were sold were accepted outside the confines of Indiana, and payment was made to branches in other states. There was no showing of a tax evasion. We cannot say that income so received by the appellees was "derived from sources within the State of Indiana." Perhaps we should call attention to the fact that § 2 of the Gross Income Tax of 1933 has since been amended. Acts 1937, Ch. 117, § 2, p. 604, § 64-2602, Burns' 1933 (Supp.), § 15982, Baldwin's Supp. 1937.

The judgment is affirmed as to Class A and E transactions, and reversed as to Classes C and D. The Superior Court of Marion County, Room 3, will sustain the appellants' motion for a new trial and enter a judgment as indicated by this opinion. The costs are adjudged equally against the parties.

APPENDIX D.**Indiana Gross Income Tax Act of 1933, as Amended.****Burns' Indiana Statutes (1943 Replacement), Sec. 64-2628.**

Sec. 28. The administration of this act is vested in and shall be exercised by the department of treasury, except as otherwise herein provided. Such administration shall be under the supervision of the director, and all notices, summons, warrants, waivers, demands, and other written documents except as otherwise provided in section 29, shall be signed by him, and when so signed shall be regarded as the official acts of the department. The enforcement of any of the provisions of this act in any court shall be under the direction of the department. The director may require the assistance of, and act through, the prosecuting attorney of any county, and may, with the assent of the governor, employ special counsel in any county to aid the prosecuting attorney, the compensation of whom shall be fixed by and paid only upon the approval of the governor; but the prosecuting attorney of any county shall receive no fees ~~for~~ compensation for services rendered in enforcing this act, in addition to the salary paid to such officer. \ The director, with the approval of the governor, may appoint, as needed, such counsel, agents, clerks, stenographers, and other employees as authorized by law, who shall serve under him, shall perform such duties as may be required, not inconsistent with this act, and are hereby authorized to act for the department as the director may prescribe and as provided herein. In case of violation of the provisions of this act, the department may decline to prosecute for the first offense, if, in the judgment of the director, such violation is not willful or flagrant.



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 75

FORD MOTOR COMPANY,

Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH
M. ROBERTSON, AND FRANK G. THOMPSON,
AS AND CONSTITUTING THE DEPARTMENT OF
TREASURY OF THE STATE OF INDIANA,

Respondents.

RESPONDENTS' BRIEF

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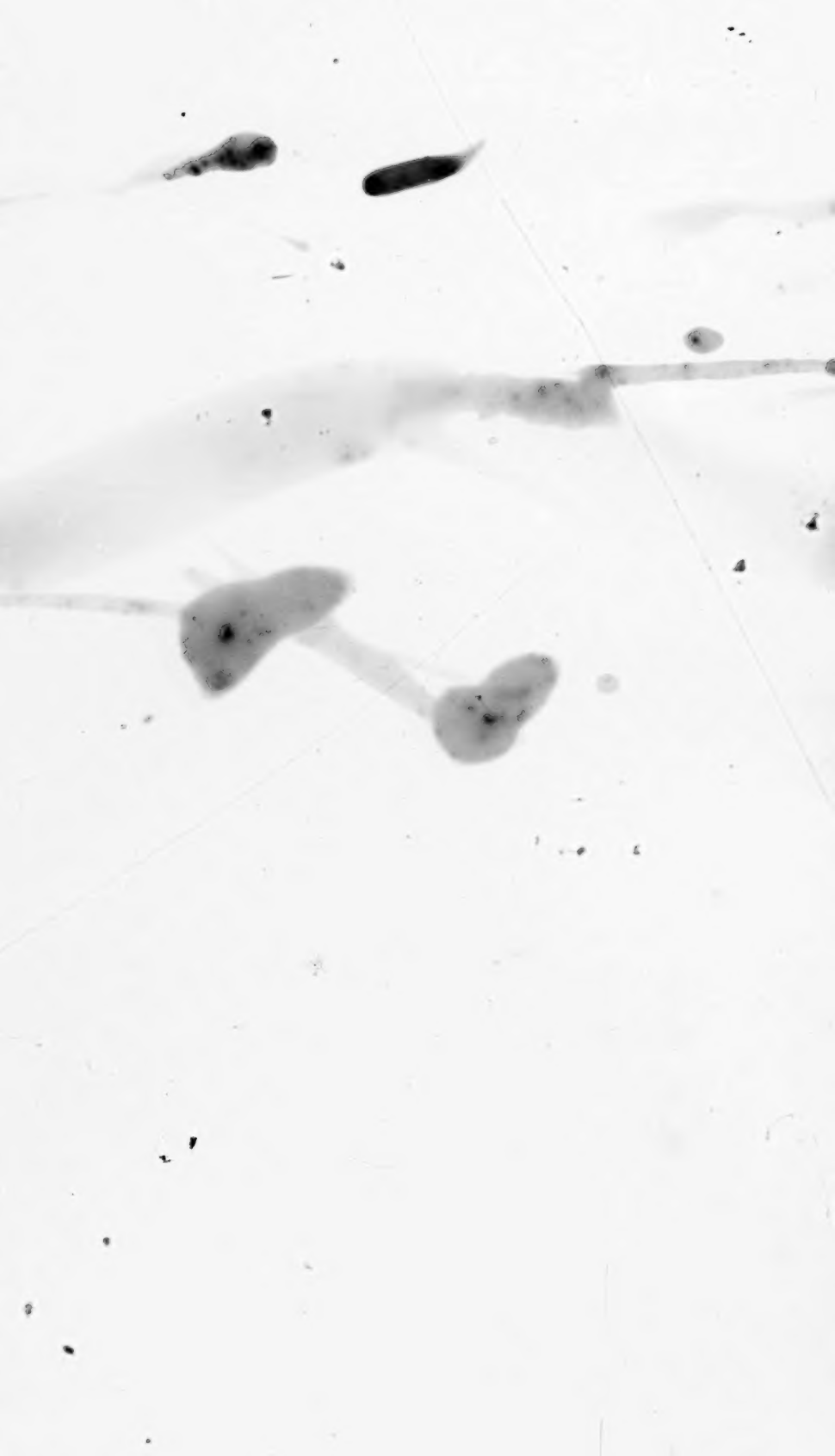
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 75

FORD MOTOR COMPANY,

Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH
M. ROBERTSON, AND FRANK G. THOMPSON,

AS AND CONSTITUTING THE DEPARTMENT OF
TREASURY OF THE STATE OF INDIANA,

Respondents.

RESPONDENTS' BRIEF

OPINION BELOW

The United States District Court for the Southern District of Indiana, Indianapolis Division, delivered no opinion; its final decree is found at (R. 82). The opinion of the Circuit Court of Appeals of the United States for the Seventh Circuit (R. 98-103) is reported in 141 Fed. (2d) 24.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered on March 4, 1944 (R. 98). The Petition for a Writ of Certiorari was filed on May 3, 1944, and was served on respondents on May 4, 1944. The Appellate jurisdiction of this court depends on section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U. S. C. A. 347. Certiorari was granted on May 29, 1944.

Since certiorari was granted, this court decided *Great Northern L. Ins. Co. v. Read* (April 24, 1944), 322 U. S. 47, 64 S. Ct. 873. This decision has caused respondents to question the jurisdiction of the trial court and, consequently, of this court.

1. Facts on Which Jurisdiction Depends.

This action was brought against the Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Department of Treasury of the State of Indiana (R. 2), by the petitioner, a Delaware corporation (R. 2). The complaint discloses that the defendant-respondent, Department of Treasury, is an executive department of the State of Indiana (R. 2) in which is vested the enforcement of the Indiana Gross Income Tax Act (R. 2). The complaint alleged that the plaintiff-petitioner had been improperly charged with Gross Income Tax (R. 3) and asked refund thereof (R. 11). The answer to the complaint was filed by the Attorney-General of Indiana (R. 25) and was addressed to the merits of the action (R. 11-25). In fact, no objection has heretofore been made to the jurisdiction of the trial court, of the Circuit

Court of Appeals, or of this court. The answer admitted the capacity in which the parties sued and were sued (R. 12).

The amendment of and supplement to the complaint thereafter filed repeated the allegations as to the capacity of the parties (R. 27-28) and sought a recovery upon an account stated (R. 30). The answer to this amendment and supplement was likewise filed by the Attorney-General, (R. 39), was addressed to the merits (R. 34-39), and admitted the capacities in which the parties sued, and were sued, (R. 33), and in addition disclosed that the defendants, Townsend, Robertson and Thompson, were the Governor, Treasurer and Auditor of State, respectively (R. 33).

The complaint (R. 2) and supplemental complaint (R. 27-28) alleged, and the answer (R. 12) and answer to supplement (R. 33) admitted, diversity of citizenship and presence of a federal question as the basis for jurisdiction.

The findings of fact and conclusions of law reported by the Special Master were adopted by the District Court (R. 40). The findings repeat the allegations of the complaint as to the capacity of the parties at the time suit was brought (R. 41) and jurisdiction (R. 41, 42).

2. Application of the 11th Amendment.

In every instance where the individual defendants are named or mentioned in the record they are particularly described "*as and constituting the Department of Treasury of the State of Indiana,*" which is named as a party and described as an executive department of the State of Indiana. It is disclosed on the face of the complaint and throughout the record that these defendants have no individual interest in the controversy but that, on the contrary,

the action seeks a recovery of money from the state treasury that had been collected from the plaintiff-petitioner and paid into the general fund of the State. *Indiana Gross Income Tax Act of 1933, as amended*, sec. 21, Appendix A, *post*, p. 41. This action then was an action by a non-resident against the State of Indiana within the prohibition of the 11th Amendment to the constitution and the question is one of jurisdiction of the Federal courts. *In re Ayers* (1887), 123 U. S. 443, 489. The Department of Treasury is named defendant as an executive department of the State exercising the purely political function of collecting taxes. The persons named as parties defendant were not named as individuals, but only to the extent that they constituted the Department of Treasury. The first paragraph of complaint (R. 2-11) was predicated upon a statutory refund procedure which provides for payment of any judgment out of any unappropriated monies in the general funds of the State. The supplemental paragraph II of the complaint (R. 27-30) states a cause of action upon an account stated and the only relief demanded is a personal judgment against the defendant, Department of Treasury of the State of Indiana (R. 30), an executive department exercising only political functions (R. 27).

It is, therefore, apparent on the record that this action is in form and substance an action against the State of Indiana in its sovereign capacity. *Great Northern L. Ins. Co. v. Read, Commr.* (April 24, 1944), 322 U. S. 47; *Smith v. Reeves* (1900), 178 U. S. 436; *In re Ayers* (1887), 123 U. S. 443, 489; *Shoemaker v. Board* (1871), 36 Ind. 175, 186. Under the provisions of the 11th Amendment to the constitution, this action was not cognizable by a Federal Court unless the State may be deemed to have consented to it. *Great Northern L. Ins. Co. v. Read* (1944), 322 U. S. 47.

3. Was There Express Consent by the State to Be Sued in Federal Court?

The constitution of Indiana authorizes the legislature to make provision by general law for suits to be brought against the State and prohibits special acts authorizing such suit. *Article 4, Section 24, Appendix B, post, p. 45.* Under this provision only the legislature may grant such consent.

Prior to the enactment of the Gross Income Tax Law, the only law of Indiana concerning a general right to sue the State restricted the venue to the Superior Court of Marion County (2 Burns' Indiana Statutes, § 4-1501, *Appendix B, post, p. 45*), and the cause of action to suits upon contract.

In the Gross Income Tax Law of 1933, *Appendix A, post, p. 41, Section 14*, the legislature provided an administrative remedy for refund of taxes erroneously paid. Upon denial of such refund claim by the administrative officers, the taxpayer is authorized to bring suit for such refund. This authorization of suit is as follows:

"Any person improperly charged with any tax provided for under *the terms of this act*, and required to pay the same, may recover any amount *thus* improperly collected, together with interest, in any proper action or suit against the department *in any court of competent jurisdiction*; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any *tax* improperly collected: Provided, however, That no court shall entertain such a suit, unless the taxpayer shall show that he has *filed a petition for refund with the department*, as hereinabove provided, within one year

prior to the institution of the action: * * *
(Italics supplied.)

This section is clearly inapplicable to paragraph two of the complaint herein as that paragraph is a suit upon an account stated upon which no refund claim was filed. It is an action against the State upon contract which the general act required to be submitted to the Marion Superior Court sitting as a court of claims. The State at no time has consented that such an action be filed in the Federal courts and, consequently, the District Court had no jurisdiction whatever over that action. The suability of the State is restricted to the terms of its consent. *Great Northern L. Ins. Co. v. Read* (1944), 322 U. S. 47.

Paragraph one of the complaint is clearly governed by the refund provisions of the Gross Income Tax Act above quoted and the jurisdiction of the District Court depends upon a construction of those provisions. The inquiry is as to whether they constitute a consent by the State to be sued in the Federal Court.

At first blush the phrase "in any court of competent jurisdiction" would appear to be inclusive and decisive. However, jurisdiction includes not only territorial jurisdiction, but also jurisdiction over the person and subject matter. Thus the State's consent is limited to courts having jurisdiction over causes of action against a state and over the person of the defendant. In the face of the 11th amendment, the legislature could hardly have then understood that the Federal Court was a court of competent jurisdiction over claims against the State for that amendment negatives the existence of jurisdiction over that subject-matter. *State ex rel. v. Board* (1875), 49 Ind. 457, 459.

Furthermore, immediately following this phrase, the legislature states specifically the courts which shall have original jurisdiction of such an action, mentioning only the Circuit and Superior Courts of the taxpayer's residence. In the original act only the Circuit Court was mentioned. The phrase "in any court of competent jurisdiction" first appeared in 1937 when the legislature added the Superior Courts of taxpayer's residence as courts having jurisdiction over the subject-matter. It is entirely reasonable to infer that the legislature had in mind that the courts of competent jurisdiction were those upon which it then conferred jurisdiction and that the phrase "in any court of competent jurisdiction" was added in 1937 because then, for the first time, more than one court was vested with competent jurisdiction. Such mention of a particular state court has been held to warrant an inference that the legislature did not intend to consent to a suit in Federal Court. *Smith v. Reeves* (1900), 178 U. S. 436. This is merely the application of the rule of statutory construction that the express mention of one thing implies the exclusion of others. *Branson v. Studebaker* (1892), 133 Ind. 147; *Princeton Coal Co. v. Fettingner* (1916), 185 Ind. 675.

It may be argued that the provision granting jurisdiction to the Circuit and Superior Courts of the county of taxpayer's residence or location concerned merely the venue. Two answers suggest themselves. First, unless this be a grant of jurisdiction, the Circuit and Superior Courts mentioned would be wholly devoid of jurisdiction over the subject-matter of these suits and the statute is in terms a grant of jurisdiction. Second, there is no statute placing the venue in any other county which required modification in order to place the venue in the county of taxpayer's residence.

No objection was made in either the trial or appellate courts upon this ground and the question of jurisdiction over this action against the State was not mentioned or decided. Several previous actions of a similar nature have been prosecuted to final judgment in the federal courts by other taxpayers without objection by the State. If it be within the power of the administrative and executive officers of the State to waive the State's immunity it must be conceded that they have done so in this action. The constitutional provision which grants the power to the legislature to make such waiver restricts its exercise to a provision therefor by general law. *Indiana Constitution, Article 4, Section 24, Appendix B, post, p. 45.* If the legislature may act only by general law and is prohibited from granting a waiver in a specific case, certainly the administrative and executive officers cannot be empowered to grant or withhold waivers in individual cases as their discretion may dictate.

The taxpayer seeking to recover from the State must strictly pursue the remedy granted. *Shoemaker v. Board* (1871), 36 Ind. 175, 188; *Maas & Waldstein v. U. S.* (1930), 283 U. S. 583, 589; *Paul, Federal Estate and Gift Taxation* (1st ed., 1942), p. 915. Appellant, by suing in Federal Court, has not done so.

4. Appellee Has Not Performed the Conditions Precedent to Suit.

This action is a suit for refund of tax alleged to have been unlawfully collected from the petitioner. It is required as a condition precedent to such suit that:

... no court shall entertain such a suit, unless the taxpayer shall show that he has filed a

petition for refund with the department as herein-above provided. * * *"

Previously, in the same section, it is required that:

"In such petition, he shall set forth the amounts which he claims should be refunded, *and the reasons for such claim.*" (Italics supplied.)

11 Burns' Indiana Statutes (1943 Replacement), § 64-2614, Appendix A, *post*, p. 41.

The petitioner did not file any claim for refund on the theory of account stated, nor upon the ground that it was non-taxable under section 2 of the Gross Income Tax Act (R. 66). While the court below found as a fact that the claim for refund was sufficient as to form (R. 66), it also found as a fact the specific grounds which were presented in such claim (R. 68).

The petitioner has not complied with the terms and conditions placed by the State upon its waiver of immunity and cannot claim such waiver. *Maas & Waldstein Co. v. U. S.* (1930), 283 U. S. 583, 589; *Shoemaker v. Board* (1871), 36 Ind. 175, 188.

This proposition was argued in respondents' brief opposing the petition for certiorari (p. 14, ff.) and will not be here extended.

QUESTIONS PRESENTED

1. Where petitioner delivers automobiles to a carrier outside the State, charges prepaid, for delivery to dealers within the State, under a contract requiring payment of the purchase price before delivery and before transfer of

title, such dealers being restricted and supervised by petitioner in the conduct of their business, within the State, are the receipts from such sales received from a source within the State?

2. Whether an action against a state upon an account stated can be predicated solely upon an outline of legal principles formulated by the hearing judge of an executive department of the state, which outline of legal principles was referred to the auditors of that department for an audit of the taxpayer's books and for the computation of the amount to be refunded, where:

(a) Such audit report approved a smaller amount of refund to the taxpayer than the taxpayer claimed, such audit report being approved by the head of the department who was by statute granted the sole power to act officially for the department.

(b) No amount of tax refund was stated in the outline of legal principles upon which the taxpayer bases his claim of an account stated.

(c) None of the officers involved had any statutory authority to enter into any compromise or other contract, on behalf of the State.

(d) The trial court specifically found the terms of the agreement between the parties and that respondents had complied with that agreement.

STATUTES INVOLVED

1. The first question presented, *supra*, involves taxes for the years 1935, 1936 and 1937. As to the first two years, this question involves a construction of section 2

of the Gross Income Tax Act of 1933 which is set out in Petitioner's Brief in Appendix A at page 41. As to 1937, the question involves an interpretation of such section 2 as amended in 1937, which amended section is set forth in Petitioner's Brief in Appendix A at p. 41.

STATEMENT

Upon petitioner's original (R. 2) and supplemental (R. 26) complaints and respondents' answers thereto (R. 11 and 31) the court stated its Findings of Fact (R. 41). The evidence in the cause has not been brought into the record (R. 90). Upon these Findings, the court stated its conclusions of law (R. 81) and rendered judgment for the respondents (R. 82), which judgment was affirmed by the Circuit Court of Appeals (R. 98-103).

The pertinent facts contained in the Findings of the court may be summarized as follows:

1. This Litigation. On July 1, 1938, the respondent, Department of Treasury of the State of Indiana, pursuant to the Indiana Gross Income Tax Act, made a proposed assessment upon the petitioner (R. 63). After due protest (R. 65) and final assessment (R. 65) petitioner paid such assessment (R. 65). Within the time and under the procedure specified by section 14 of the Indiana Gross Income Tax Act (Appendix A, *infra*, p. 28) petitioner filed with respondents a petition for refund of the taxes so paid (R. 66), which petition was in proper form (R. 68), and in which petition petitioner specifically stated the reasons for its such claim as follows (R. 66):

"(1st) That the receipts were from commerce between the states, and under Section 8, Article I

of the Constitution of the United States, the tax was void;

“(2) That the receipts were from transactions completed outside of the State and were not taxable under Section 1 (m) of the Gross Income Tax Act as amended, nor under Regs. 191 and 193 under the 1933 Act, and further, if such receipts were taxable, then the Act was in conflict with the Fourteenth Amendment to the Constitution of the United States;

“(3rd) All of the tax assessed on Class A sales for the year 1935 and that portion of tax for the year 1936 collected for the first three quarters was not assessed ‘at any time within two years after the time when the return covering such gross income was filed, and after due notice by registered letter, to the taxpayer,’ and such assessment for the aforesaid periods was therefore void. Plaintiff’s refund petition also set forth as Exhibits schedules demonstrating certain errors in the original audit figures of the figures of the defendants which were attached to the notice of proposed assessment of July 1, 1938.”

Thereafter, on June 7, 1939, petitioner filed its complaint in this cause for such refund. The complaint alleged the above facts and after alleging the method by which it did business stated as its grounds for recovery in regard to Class A sales (R. 7-8) that the taxation of such receipts was prohibited by the commerce clause of the Constitution of the United States; that such receipts were derived from activities, business and sources outside the State of Indiana under the provisions of section 2 of the Gross Income Tax Act of 1933 and as amended in 1937; and that if construed to be taxable under the Gross Income Tax Act then the Act is in violation of the Fourteenth Amendment of the Constitution of the United States. To this complaint the

respondents addressed an answer of admission and denial (R. 11-35).

On October 27, 1941, the petitioner filed an amendment of and supplement to their complaint, amending Paragraph I of their complaint in one particular (R. 26-27) and adding a second paragraph of complaint (R. 27-30), which second paragraph alleged that after the filing of this cause the parties agreed to a review of the decision upon the claim for refund theretofore filed, and that for that purpose petitioner filed with the respondents a request for reconsideration and that respondents acquiesced in such request for reconsideration and upon reconsideration agreed with the petitioner that the transactions taxed were not taxable and notified petitioner that the claim for refund had been allowed; that petitioner acquiesced in such allowance and ruling and that by reason of such allowance and acquiescence an account was stated between the parties. To this amended and supplemental complaint the respondents filed answer (R. 31-39) denying any account stated and setting up additional facts concerning the negotiations between the parties.

The cause was referred to a special master (R. 40) who made report which was adopted by the court as its Findings of Fact (R. 40).

2. The Contract Between the Petitioner and Its Dealers in General. Each dealer to whom the petitioner sells its products enters into a contract with the petitioner the form of which is set forth in the Findings of Fact (R. 43-49). By this contract the petitioner agrees to sell and the dealer agrees to purchase petitioner's products F. O. B. Detroit, Michigan, at the prices from time to time determined by the company. Sales are to be upon a cash basis

only and it is expressly provided that full payment precede delivery (Clause 2, R. 44), and that title remain in petitioner until the price is paid (Clause 6, R. 45). In addition to the payments specified, the company is permitted to add an amount determined by it for freight, packaging and other handling expense and any taxes imposed by the dealer's state (R. 44). The dealer agrees to comply with the company's requirements in the operation of its business and its method of selling to the consumer. The method of ordering is specified (R. 46-47), provision is made for termination (R. 47-48), construction of the contract is to be by the law of Michigan (R. 48), assignment without consent is forbidden (R. 48), modification variance or cancellation is prohibited except by instrument in writing executed by certain executive officers of the petitioner (R. 48), and it is agreed that the contract states the full agreement between the parties (R. 48).

3. Specific Provisions of the Contract Upon Which Respondents Rely. The contract (Clause 2, R. 44) specifically provides:

"Payment by dealer is to be in cash before delivery, or by paying sight draft attached to Bill of Lading, including exchange."

The contract further provides (Clause 6, R. 45):

"Title to all company products until actually paid for by dealer shall be and remain in company; but regardless of title remaining in company or having passed to dealer all shipment shall be at dealer's risk from the time of delivery to carrier at place of shipment: * * *"

Clause 9 (h) provides (R. 48):

"The terms of this agreement may not be enlarged, varied, modified or cancelled by any agent or representative of company, except by an instrument in writing executed by the President, Vice-President, Secretary or Assistant Secretary of company and company will not be bound by any alleged enlargement, variation, modifications, or agreement not so evidenced."

4. Petitioner's Manufacturing and Sales Organizations.

Petitioner is a Delaware corporation (R. 41). It is engaged in the business of manufacturing motor vehicles with a plant and principal place of business at Dearborn, Michigan, and assembly plants *inter alia* at Chicago, Illinois, Cincinnati, Ohio, and Louisville, Kentucky (R. 42). The plant at Dearborn, Michigan, manufactures the parts, *i. e.* motors, chassis, wheels, fenders, bodies, etc., which are then shipped to the assembly plants (one assembly plant is also maintained at Dearborn), where manufacture of the motor vehicle is completed by the assembling, painting and processing of these parts (R. 61).

The assembly plants also operated as regional sales agencies with territories that in the instant case overlap state boundaries. No assembly plant is located in Indiana (R. 42, 43), but petitioner maintains at Indianapolis a branch for storage and distribution, this branch being allotted a territory in the central part of Indiana, the remainder of the State being divided among the out-of-state assembly plants (R. 49-50).

5. Method of Ordering. The dealers place a preliminary order with the branch to which they are assigned, by mail, by the tenth of each month. From these orders

petitioner makes up production schedules, allots the units and prepares shipping schedules (R. 50-51).

Dealer's order contains a detailed specification of the type of vehicle, color, body, upholstery, and special equipment and the units are manufactured specifically according to such orders at the assembly plant (R. 50-51).

6. Delivery of the Units. When manufacture has been completed at the assembly plant and the unit tested and checked against the invoice it is delivered to the dealer or a carrier at the gate of the assembly plant (R. 52). The Class A sales here involved were all delivered to the truckaway companies and none were delivered to the dealer (R. 63-64). The employees of the truckaway company signed the invoice as agent of the dealer without specific authority but as a matter of custom known to the dealer (R. 52-53).

7. Payment by the Dealers. In regard to Class A sales the dealer paid the purchase price to the truckaway company in cash upon delivery by the truckaway company at the dealer's place of business in Indiana; or by executing finance papers to a finance company, where by pre-arrangement the finance company agreed to pay the petitioner the cash represented by such finance papers; or by a combination of cash and finance papers. All such cash and finance papers were delivered to the truckaway company at the dealer's place of business in Indiana and were transmitted by it to the petitioner at its out-of-state assembly plants (R. 63-64). Petitioner erroneously states in its brief (p. 5) that some payments were made in cash or by finance papers before the product left the assembly plant, and refer to R. 53 where the court is considering petitioner's general practice as to all sales. At R. 63-64 the court clearly states

that all sales *involved in this action* were paid for at the dealer's place of business in Indiana upon delivery.

The finance papers are in the form of trust receipts reciting that a security interest has passed to the finance company (R. 54). Both the truckaway and finance companies were independent of the petitioner and the dealers. The truckaway companies were contract carriers until 1937 and common carriers thereafter.

8. Retention of Control During Shipment. The petitioner exercised its right of title and possession during shipment by diverting deliveries "*a great many times,*" during the entire course of assembly and shipment and up to the time of final payment by and delivery to the dealer at his place of business in Indiana (R. 57-58). In such instances, the petitioner would direct delivery to another dealer even during or at the termination of transit and would re-bill the unit to such other dealer.

9. Ultimate Facts Stated by the Court. Upon these facts the court stated the ultimate facts that these units were delivered by petitioner to its Indiana dealers in the State of Indiana (Finding 17, R. 78); that the truckaway companies acted as agents of the dealers where they signed finance papers on their behalf; as agents of the petitioner in transmitting collections from the dealers to petitioner; and as carriers in the transportation of the goods, and that the receipts from such sales were derived from sources in Indiana from the sale and transfer of the goods which were delivered to the purchaser in Indiana.

10. The Facts Concerning the Account Stated. While this cause was pending in the trial court pursuant to conversations between counsel, petitioner requested a rehear-

ing upon its petition for refund theretofore filed with the respondents (R. 68). Pursuant to such request counsel and one, Elmer F. Marchino, an employee of respondents, designated as a hearing judge to hear such matters, made a further investigation of the facts (R. 69), and pursuant to such request for a re-hearing and the investigation thereon the Hearing Judge executed and mailed to petitioner a letter which appears on pages 73-75 of the record and which may be summarized as follows: It is stated that the request for reconsideration was based upon the contention of the petitioner that the transaction concerning the sale of petitioner's motor vehicles,

"At points outside of the State of Indiana and there delivered to Indiana customers within the territorial limits of that outside branch or assembly plant constituted a transaction completed in its entirety outside of the State of Indiana and thus did not fall within the purview of the Gross Income Tax Act."

The facts upon which the decision was made are stated to be that the Indiana dealers or their authorized agents take delivery at the out-of-state assembly plant under conditions whereby petitioner at the time of delivery is paid for the products either in cash or by appropriate financing and does not have the obligation or responsibility to make delivery into Indiana or to initiate the transportation into Indiana, but on the contrary that petitioner's entire responsibility ceases at the time of delivery of the products at the assembly plant outside the State.

It was then held that *such transactions* are completed at a business situs entirely outside of the State of Indiana and are not transactions in interstate commerce and that a refund will be made thereon.

Following this decision various conversations and negotiations were had between counsel, court and employees of the Department and, pursuant to the directions in the decision that the Department take the necessary steps to make refund, an audit was made by the respondent (R. 77) by which audit the Department found that the transactions mentioned in the decision amounted to \$10,267.45, upon which petitioner was entitled to a refund of \$25.67, which was paid and accepted without prejudice to the rights of the parties (R. 77, Finding 14).

Upon these facts the court made the ultimate finding that respondent did not at any time promise to refund \$78,514.10 (being the tax on *all* Class A sales), or any other specifically stated amount, and that no certificate of over-assessment was ever issued by respondents (R. 77, Finding 15).

11. Conclusions of Law. Upon these facts the court concluded *inter alia* that no account stated arose between petitioner and respondents, that the tax assessed and collected under Class A transactions is not prohibited by the Constitution of the United States and was lawfully assessed and collected and that the law is with the respondents and against the petitioner (R. 81).

12. Decision of the Circuit Court of Appeals. This cause being submitted to the Circuit Court of Appeals solely upon errors arising out of the court's conclusions of law (R. 98), the court quoted the Findings of Fact referring particularly to Class A sales (being Finding No. 10, R. 63, and Finding 17 (B), R. 79-80), and held that from these Findings it is clear that all transactions in Class A sales took place in Indiana except the manufacture, assembling, and shipment of the goods and the

receipt of some orders, and distinguished *Department of Treasury v. International Harvester Company*, 47 N. E. (2d) 150, upon the ground that in the Class A sales in that case the articles were accepted and paid for outside of Indiana, while in the case at bar they were accepted and paid for in Indiana (R. 101). To this conclusion Bindley, D. J., dissented.

The court further held that no account stated arose between the parties. In this regard the opinion was unanimous.

SUMMARY OF ARGUMENT

I.

There Is No Error in the Decision That the Source of Petitioner's Receipts Was Within the State.

Section 2 of the Indiana Gross Income Tax Act of 1933 taxes non-residents upon all their gross receipts from sources within Indiana.

The geographical source of income from the manufacture and sale of goods is in the jurisdiction where the sale is made.

Eastman Kodak Co. v. D. C. (1942), 76 U. S. App. D. C. 339, 131 Fed. (2d) 347;

Tootal Broadhurst Lee Co. v. Commissioner (1929), 30 Fed. (2d) 239.

Upon the facts the gross receipts taxed were received from sales consummated by delivery in Indiana.

Webb v. Clark County (1927), 87 Ind. App. 103;

Bruno v. Phillips & Co. (1923), 80 Ind. App. 658, 667;

Franklin Bank v. Boeckeler Lbr. Co. (1924), 83 Ind. App. 94;

Martz v. Putnam (1888), 117 Ind. 392;

U. S. Express Co. v. Keefer (1877), 59 Ind. 263;

Branigan v. Hendrickson (1896), 17 Ind. App. 198.

II.

The decision below does not conflict with *Department of Treasury v. International Harvester Co.* (1943), 221 Ind. 416.

That decision holds that where a sale is consummated by delivery outside the State of Indiana the receipts from that sale are not received from a source within Indiana. It also holds that where goods are delivered in Indiana pursuant to a sale negotiated elsewhere the receipts from the sales are received from a source within the State.

This interpretation is further evidenced by the companion case of *Department of Treasury v. Loose-Wiles Biscuit Company* decided upon the same day.

The *International Harvester* case was decided under the original Gross Income Tax Act, whereas the Act has been broadened by amendment in 1937 and part of the receipts here involved were correctly taxed under the amended Act.

State v. Board (1925), 196 Ind. 472.

III.

There was no error in the decision denying petitioner recovery upon an account stated. The officials who were alleged to have stated the account had no authority to contract on behalf of the State.

Julian v. State (1890), 122 Ind. 68;

McAslin v. State (1885), 99 Ind. 428.

The court below expressly found that the only contract between the parties was that the respondent would make a new audit to determine the amount to be refunded, if any, in accordance with the legal principles stated by the Letter of Findings issued by the hearing judge. This agreement the court found to have been fully performed by the respondent. The petitioner has not assigned as error any insufficiency of the evidence to support such specific findings and the evidence is not in the record before this court. Wherefore, such findings must be assumed to be correct.

The court below further specifically found that the parties did not know the amount involved in the sales described in the Letter of Findings and that respondent did not promise to pay petitioner \$75,514.10. The sufficiency of the evidence to support these findings is not questioned and, therefore, there cannot be any account stated.

Bouslog v. Garrett (1872), 39 Ind. 338.

IV.**The Facts Stated by the Court of Appeals Are in Accord
With the Findings of Fact Stated by the Trial Court.**

The petitioner relies upon various statements of evidentiary fact appearing in the findings of the trial court. The evidence upon which the trial court found the facts is not in the record. The petitioner does not present any question as to the sufficiency of the evidence to support all the facts found by the trial court but merely argues that each fact unfavorable to it constitutes a conclusion of law.

The facts as found by the trial court are consistent and fully support the statement of the case made by the Court of Appeals.

ARGUMENT

Petitioner's specifications of the questions involved and of assigned errors presents no question concerning the constitution or laws of the United States. (*Petition for Writ of Certiorari*, pp. 2 and 13; *Petitioner's Brief*, p. 11.) Only questions of state law are presented and argument will be limited to these questions. (Rule 38, par. 2.) The specifications will be discussed in the order in which they are stated.

I.

The Trial Court and Court of Appeals Correctly Held That the Source of Petitioner's Receipts Was Within the State of Indiana.

1. The Taxing Act to Be Construed.

The tax which petitioner seeks to have refunded was assessed and collected upon its gross income for the years 1935 to 1939. This tax was levied in part by section 2 of the Indiana Gross Income Tax Act of 1933 and in part by an amendment of that section in 1937. The pertinent parts of the original and amended acts with additions in italics and eliminations in struck type are as follows:

"Such tax shall be levied * * * upon the receipt of gross income derived from ~~sources~~ *activities or business or any other source* within the State of Indiana, of all persons ~~and/or companies, including banks,~~ who are not residents of the State of Indiana, ~~but are engaged in business in this State or who derive gross income from sources within this State~~ * * *"

Cf. Appendix A, p. 41, post.

2. "Source" of Income Defined.

Were the petitioner's gross receipts derived from "sources" within Indiana under the 1933 act and from "activities or business or any other source" under the 1937 amendment?

"It has been consistently held that, unless a different legislative intent appears, the geographical 'source' of income from the manufacture and sale, or purchase and sale, of goods is in the jurisdiction where the sale is made."

Eastman Kodak Co. v. D. C. (1942), 76 U. S. App. D. C. 339, 131 Fed. (2d) 347.

In *Tootal Broadhurst Lee Co. v. Commissioner* (1929, C. C. A., 2), 30 Fed. (2d) 239, 240, the court says:

"The method of disposing of petitioner's product was by sale in the United States. It was the happening of that event, the sale, which was the determining factor of whether it sustained a loss or made a profit. The gross income thus came from sources within the United States."

This statement is equally applicable to a gross receipts tax where the sale is the determining factor as to any amount to be received. Such a tax upon gross income from sources within the State so applied as to be levied upon the sale price of goods sold within the State does not contravene the due process clause. *Panitz v. D. C.* (1941), 74 U. S. App. D. C. 283, 122 Fed. (2d) 61. Nor would it constitute an unlawful burden upon interstate commerce. *International Harvester Co. v. Department* (1944), 321 U. S. —.

3. The Factual Issue.

The present issue is one of fact as to whether the sales were consummated in Indiana. If so, they are taxable. If not, they are not subject to tax. Both the District Court and the Circuit Court of Appeals resolved this factual issue in favor of respondents.

The trial court found as an ultimate fact that the property sold was delivered in Indiana (Finding No. 17(a), p. 78) and that the gross receipts in question were derived from sources in Indiana, from the sale and transfer of plaintiff's property (Finding No. 176, p. 80). Petitioner contends, however, that these findings are conclusions of law which must be disregarded and that they are inconsistent with other findings. The material facts are as follows:

The relationship between petitioner and its dealers was founded upon an express written contract which provided that neither delivery of possession nor transfer of title should pass to the dealer prior to full payment of the purchase price. "Payment by Dealer is to be in cash before delivery" (clause 2, R. 44) and "Title * * * until actually paid for by dealer shall be and remain in Company;" (R. 45, cl. 6). Under the law of Indiana which controls in this case under the doctrine of *Eric R. Co. v. Tompkins* (1938), 304 U. S. 64, these provisions postpone the transfer of title and possession until the purchase price is paid. Until then there is an executory contract of sale but no sale. *Webb v. Clark County* (1927), 87 Ind. App. 103; *Bruno v. Phillips & Co.* (1923), 80 Ind. App. 658, 667; *Franklin Bank v. Boeckeleys Lbr. Co.* (1924), 83 Ind. App. 94, 97. Petitioner argues, however, that these provisions merely reserve in petitioner a security interest. But the

distinctive elements of a conditional sale are "Possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price." 11 *Burns' Indiana Statutes* (1943 replacement) 58-801, (*Uniform Conditional Sales Act*) Appendix C, post, p. 47. The present contract postpones both delivery of possession and transfer of the title to the time of payment of the purchase price, at which time possession and title are transferred to the buyer without reservation of any security interest. Prior to such payment the buyer has neither title, possession, nor any other claim in the goods. No credit is extended which a security interest could secure.

Petitioner's retention of full property in the goods during transit and up to the moment of payment is further evidenced by its exercise of control over the goods during that time by diverting them to other purchasers. (R. 57, par. n.) While such diversions were small in proportion to total sales, the volume was large enough that such diversions occurred "*a great many times*." (R. 57, par. n, 4.) The practice of making these frequent diversions is adverted to for no other purpose than that of showing that the rights of possession and ownership granted by the contract were exercised by petitioner at all times before payment was received and delivery made at the dealer's place of business.

Petitioner points to the provisions of the contract making the sale "f. o. b. Detroit" (R. 44, clause 2) and requiring the dealer to pay "*such amount as Company shall . . . determine*" for freight and handling expense (R. 44, clause 3) as indicating that the place of delivery is elsewhere than at the dealer's place of business. The only

place of delivery that such provisions could refer to is Detroit, Michigan. But this is impossible. The manufacture of the automobiles was not completed until they issued from the assembly plants at Chicago, Cincinnati, or Louisville, where they were assembled, painted and processed. (R. 61.) The only interpretation consistent with the facts is that these provisions established Detroit as a price basing point. Petitioner retained the right as a seller to include in the purchase price such amounts as it chose to charge as freight and handling expense which might or might not approximate the actual freight rate for shipment of a completed automobile from Detroit to the dealer's place of business. In fact, if the actual freight was paid by the dealer it alone was credited to the charges thus set by petitioner and petitioner made any profit represented by the difference. It would seem to be obvious then that these provisions established pricing arrangements rather than specifying any point of delivery. In fact, petitioner's full retention of control over the means, manner and routing of shipment would be more indicative of its retention of possession during such shipment than otherwise.

Petitioner also contends that the provision of the contract placing all shipments at dealer's risk from point of shipment indicates an intent to make delivery at that point. It can well be argued, however, that this provision implies a contrary intent. If the sale were consummated at the place of shipment, then the risk of loss during shipment would be upon the buyer, as owner of the goods, without any contractual provision (*Branigan v. Hendrickson* (1896), 17 Ind. App. 198) and this stipulation would be surplusage. The necessity for the dealer's contractual assumption of risk arises out of the fact that the property

in the goods had not been transferred to him so as to impose that risk in the absence of express contractual assumption. At least this is the reasoning of the Supreme Court of Indiana in *Martz v. Putnam* (1888), 117 Ind. 392, 402, which, under the doctrine of *Erie R. Co. v. Tompkins* (1938), 304 U. S. 64, is the law of this case.

It is clearly apparent, then, that the contract between the parties expressly provides that the sale ^{is} to be consummated at the time of payment for the goods. But petitioner then argues that, in spite of the fact that the contract prohibits modification without the written approval of petitioner's executive officers (*R. 48, clause n.*), the contract was modified by the actual practice of the parties. First, it claims that because the petitioner, after shipment, looked to the carrier for its money, payment was received outside Indiana. But in doing so petitioner merely relied upon the carrier's legal liability. *U. S. Express Co. v. Keefer* (1877), 59 Ind. 263, 267. Petitioner does not disclose any reason why the petitioner's reliance upon the carrier's agreement to act for petitioner in collecting the price before delivery changed the place of payment, delivery, or transfer of title.

Second, petitioner relies upon the act of the carrier in receiving the invoice on behalf of the dealer at the time of shipment of the goods and the court's statement that in doing so the carrier acted as agent for the dealer. This argument first collides with the principle that delivery of the invoice does not consummate the sale. *Franklin Bank v. Boeckeler Lbr. Co.* (1924), 83 Ind. App. 94, 97. If it be conceded, however, that the signature to the invoice acknowledged receipt of the goods by the carrier on behalf of the dealer, yet, we must inquire in what capacity the

goods were so received. All other acts and agreements of the parties are inconsistent with the view that the goods were received by the dealer as owner. Under the facts his only interest was in protecting himself upon his assumption of risk during shipment. If the custody of the carrier was the custody of the dealer, it was as bailee for this purpose only. *Martz v. Putnam* (1888), 117 Ind. 392, 403. The goods were still the property of the petitioner which it could and a great many times did divert to other purchasers during shipment. The mere holding by the seller or buyer as bailee under an assumption of the risk of loss does not consummate the sale. *Martz v. Putnam* (1888), 117 Ind. 392, 402-3.

The sales in question were those where the purchase price was paid at the dealer's place of business in Indiana. (R. 63-64.) The court's finding as to the different methods and times of payment (R. 53) had reference to petitioner's sales in general and included sales not here involved, where payment was made differently. The goods having been paid for at the dealer's place of business in Indiana, simultaneous with unconditional delivery of the goods themselves, the sale was then and there consummated under the terms of the contract of sale and the source of the gross income was at that point in Indiana.

II.

**The Trial Court and Court of Appeal Correctly Held That
the Trial Court Decision Did Not Conflict With
*Department of Treasury v. International
Harvester Co.* (1943), 221 Ind. 416.**

The decision in *Department of Treasury v. International Harvester Co.* (1943), 221 Ind. 416, is not only

consistent with this argument, but it supports it. That case concerned four types of sales. *Class A sales* were those where, upon orders taken by salesmen traveling in Indiana and accepted at a branch in Illinois, the Illinois branch shipped to the customer in Indiana under a sales contract requiring the purchaser to "accept delivery of said goods at points of shipment." *Appendix D, p. 48, par. 1.* Although the seller reserved title with the right of re-possession upon default. *Class C & D sales* were made under the same form of contract, but delivery was made at the factory in Indiana. In the former the selling branch was located out of state and the customer was within the state while in the latter the selling branch was within the state and the customer was out of state. *Class E sales* were made by an Indiana branch to an Indiana customer where the goods were shipped from an out of state warehouse pursuant to contracts so providing.

The Indiana Supreme Court held the *Class A sales* to be from a source without the state and non-taxable under Section 2 of the Indiana Gross Income Tax Act. Petitioner claims that the decisions below are inconsistent with that case. Respondents attach to this brief as *Appendix D, p. 48*, a copy of the contract in that case as it appears in the record in cause 355, October Term, 1943, *International Harvester Co. v. Department of Treasury*, 321 U. S. A comparison of that contract with the contract in this cause discloses their essential dissimilarity. Whereas the contract here expressly provides that delivery shall not be made until full payment of the purchase price which was paid in Indiana at the destination, the contract in that case expressly required the buyer to take possession at the point of shipment which was out of the state, subject to a right of re-possession in the event of a default in payment

of the price. *Appendix D, p. 48, post, paragraphs 1 & 2.* The sales in that stated case were not consummated in Indiana. The decision below and the decision in the *International Harvester* case consistently apply the test set forth in Paragraph I, *supra*, that, the geographical 'source' of income from the manufacture and sale of goods is in the jurisdiction where the sale is made.

* The companion case of *Department of Treasury v. Loose-Wiles Biscuit Co.* (1943), 221 Ind. 248, decided by the Court upon the same day as the *International Harvester Co.* case is enlightening as to the meaning of the court. That case was not contested by the taxpayer, and the facts do not appear in the opinion. However, pertinent quotations from the complaint and stipulation of facts in that case are attached to this brief as *Appendix E, p. 55*, to show that taxpayer claimed that the receipts there taxed were not taxable under the Gross Income Tax Act and to show that the facts in that case were similar to those in the *International Harvester* case with the exception that the sales were consummated by delivery in Indiana. This confirms respondents' contention that delivery in Indiana was the taxable event under the 1933 act so far as income from sales is concerned.

The essential facts have been heretofore reviewed at length. The Special Master, the Trial Court and the Court of Appeal have all concurred in these facts and in holding the source to be within the state. To the great weight which their concurrence lends must be added the decision of the respondents which is the highest legally authorized authority of the state which has interpreted the effect of the particular facts in this case.

The 1937 Amendment to the gross income tax law governs the tax liability of petitioner for the periods after

April 1, 1937, which was the effective date of such amendment. This amendment substituted "*gross income derived from activities or business or any other source within the State of Indiana*" as the subject of taxation in place of "*gross income from sources within the State of Indiana*" which was the subject of tax in the original act. That this is an enlargement of the income subject to tax is evident from the statement of the Court in *Department of Treasury v. International Harvester Co.* (1943), 221 Ind. 416, 422, that "Perhaps we should call attention to the fact that No. 2 of the Gross Income Tax Act of 1933 has since been amended." This is at least a hint from the Court that their decision might have been different if the amended act had been under consideration. Petitioner claims that this amendment did not enlarge the scope of the act and that the meaning and intent of the amended section is identical with the original. However, the Indiana rule is that the legislative introduction of new words into a statute indicates a change in legislative meaning, that all words used in a statute must be given a meaning where possible and that in those cases the rule of *ejusdem generis* will be disregarded. *State v. Board* (1925), 196 Ind. 472. If the added words "*Business*" and "*Activities*" are to be given a meaning in addition to the retained word "*sources*," it is evident that the scope of the act has been broadened and the legislature intended to tax transactions not previously taxed.

The act, as so enlarged, would tax income received by reason of business done or activities engaged in within the state even though the transactions from which such activities were received were not fully consummated within the state. The business and activities of petitioner would clearly fall within this enlarged scope.

III.

**The Trial Court and Court of Appeals Correctly Held That
No Account Was Stated Between the Parties
Regarding the Tax on Class A Sales.**

The powers of all state officers in Indiana are limited to those powers expressly or impliedly conferred by law and all persons dealing with such officers must take notice of the source of such officers' authority. *Julian v. State* (1890), 122 Ind. 68, 73; *McAslin v. State* (1885), 99 Ind. 428, 439-40.

Any account stated must rest in contract and no contract with the state may arise unless the officer who made it had statutory authority for that purpose. Petitioners cite no such statutory authority and a careful reading of the Indiana Gross Income Tax Act discloses none.

Although Mr. Marchino is denominated a "Hearing Judge" (R. 41), there is no provision in the Gross Income Tax Law or any other law which mentions such an office or grants any power to it. On the contrary, the entire administration of the Gross Income Tax Law is lodged in the "Department" and it is specifically required that all documents must be signed by the "Director" in order to constitute the official act of the Department (11 Burns' Ind. Stat. (1943 Replacement), Sec. 64-2628, Appendix A, p. 41, *post*). The decision by Mr. Marchino was not signed by the Director (R. 71, g). It did not, therefore, constitute an official act of the Department but was merely advisory to the Director.

It must be apparent, therefore, that the said officers charged with having contracted the account stated had no authority to make such a contract. Any attempt to do so

is void and of no effect. Any finding as to the extent of their powers and authority is a pure conclusion of law which must be disregarded if it conflicts with the statutes and decided cases.

An account stated (being an agreement between the parties to a current or running account—an assent to an account—that a certain amount is due one of the parties to the account) is not in this case demonstrable. At no time was such an agreement made.

At no time was there an assent to an account.

At no time was a certain amount represented as being due.

If it were to be conceded that the taxing officials had the power and jurisdiction to contract an account stated, yet, it should seem apparent that none was finally agreed upon. The basis of petitioner's alleged account stated is the letter of findings by Mr. Marchino dated March 1, 1941. This letter of findings related to drive-away sales entirely completed at an out-of-state location. It was a statement of legal principles to be later applied to the facts as they were developed by the audit section of the department.

It is most significant that no amount is mentioned. Tax departments are not in the habit of issuing final decisions granting refunds without stating the amount to be refunded. This statement of principles is obviously an interlocutory, preliminary decision upon which further action is necessary before payment can be made. In this respect it differs materially from the decisions of the collectors relied upon by the taxpayers in the cases cited by petitioners, which decisions were final and complete. There the only action remaining to be done was the ministerial act

of making payment. Here further investigation, action and determinations were necessary. These required the exercise of discretion by the respondents.

The court specifically found that respondents did not know the amount of petitioner's gross income to which the letter of findings would apply (*Finding 13 p., R. 77*). Absent any objection as to the sufficiency of the evidence to support this finding, it must be accepted as correct. The evidence is not in the record and although petitioners rely upon certain evidentiary facts found by the court, it cannot be presumed that these findings state all of the evidence, but it must be assumed that the evidence supported the finding. Other findings, likewise uncontested, were that petitioners and respondents understood that this letter of findings ordered a refund following an audit to determine the amount. (*Findings 13 p., R. 77.*) This is a clear finding of fact as to the actual understanding and agreement between the parties. The agreement, if any, was that the respondents would make a new audit to determine the amount to be refunded in accordance with the legal principles stated by the Hearing Judge. This agreement the respondents performed. (*Finding 14, R. 77.*) The only contract between the parties, if any, has been fully executed and there is no breach that could be the basis of a cause of action.

The existence of any promise by respondents to pay petitioners \$78,514.10 is specifically negated. (*Finding 15, R. 77.*) Such a promise cannot be implied when it is specifically found that the respondents did not know the amount involved, but intended to determine the amount by future audit. (*Finding 13 p., R. 77.*) These are findings of fact, not mere evidence, not conclusions of law.

They have not been questioned by assigning insufficiency of the evidence as error and the evidence supporting them is not before the court.

This case is, then, governed by *Bouslog v. Garrett* (1872), 39 Ind. 338, where the court said:

“The evidence shows the parties attempted to make settlement of their accounts, but disagreed before they got through, and made and agreed upon no balance. In our opinion, the evidence did not sustain the paragraph on the account stated. We also think that instructions three and four were erroneous, for the reason that they informed the jury that a partial statement of the accounts by the parties, without their having arrived at any balance, was binding upon them as an account stated.”

The sales in question, in Mr. Marchino's opinion, were those where the Indiana dealer paid for the car at the out-of-state branch and there took delivery. Under such circumstances the title and dominion there passed to the customer and the petitioner had no property in it when it came to Indiana. Such a finding regarding such sales does not in any manner constitute an agreement regarding the sales here in question, where payment was made on delivery in Indiana of goods then owned and under the dominion of petitioner (R. 64).

The letter of findings referred the file to the Refund Section (R. 75) and, upon audit being made, it was found that sales of the character mentioned in the letter of findings amounted to \$10,267.45, and the tax paid upon this amount has been refunded to petitioner (R. 77, Finding Fourteen).

The most that can be said for petitioners' contention is that Mr. Merchino stated the law and referred the matter to an audit for further development of the facts and figures. Upon development of the facts by the audit, the Department paid according to the letter of findings and refused to pay upon those transactions which did not coincide with those described in the letter of findings.

In conclusion, there is no merit to petitioners' insistence that there was an account stated in this cause of action.

IV.

The Court of Appeals Did Not Err in Stating the Facts.

Respondent has heretofore reviewed the facts in detail to show that the facts found by the trial court are consistent with the decision of the Court of Appeals. The petitioners cite many evidentiary facts contained in the finding as to what the parties did, and from these evidentiary facts infers ultimate facts contrary to the ultimate facts found by the trial court upon *all* of the evidence.

Any findings of facts adverse to petitioners is labeled by it as a conclusion of law. However, findings as to the place of delivery, the intent of the parties, the existence, non-existence or terms of the contract alleged as an account stated, and the party for whom the carrier acted in a certain transaction are all findings of fact. The sufficiency of the evidence to support them has not been questioned. The evidence is not in the record and it must be assumed that these findings are supported by the evidence.

In attempting to overthrow these facts petitioners would differ with the trial court as to the weight to be accorded

to different items. It would ignore the provisions of the express contract between the parties entirely and substitute therefor its own partisan inferences drawn from acts whose purpose is obscure.

Petitioners' attack on the Court of Appeals is unwarranted and unjust.

CONCLUSION

It having been shown herein that *all* the evidence when read together substantiates the judgment below and shows that the receipts taxed were derived from sales consummated in Indiana, the contention that they were derived from sources without the state must fail whether such facts be measured by the decision in *Department of Treasury v. International Harvester Co.* (1943), 221 Ind. 416, or otherwise.

Likewise, the action or account stated must fail for lack of an agreement by an authorized official agreeing upon a balance due.

Petitioner makes certain arguments as to constitutional questions not brought to this court in the specification of errors. Some of these have been very briefly met. *McLeod v. J. E. Dilworth Co.* (1943), 64 S. Ct. 1023 is distinguishable upon the fact that the sale was consummated without the state. The due process argument alleging a discrimination between the taxability of residents and non-residents ignores the specific provision of section 1 (m) of the Gross Income Tax Act (*Petitioner's Brief, Appendix A., p. 29*) whereby residents are exempted only upon receipts derived from sources outside Indiana and attributable to a business having a legal situs outside the state.

If this court is without jurisdiction by reason of the matters noted in the Statement as to Jurisdiction, *supra*, appropriate disposition should be made by dismissal. Otherwise, the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

JAMES A. EMMERT,

The Attorney General of Indiana,

WINSLOW VAN HORNE,

JOHN J. MCSHANE,

Deputies Attorney General of Indiana,

Counsel for Respondents.

APPENDIX A

Indiana Gross Income Tax Act of 1933

Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided.

Indiana Gross Income Tax Act of 1933 as Amended in 1937

Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be in addition to all other

taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided.

Sec. 14. (a) If any person considers that he has paid to the department for any year an amount which is in excess of the amount legally due from him for that year under the terms of this act, he may apply to the department, by verified petition in writing, at any time within three years after the payment for the annual period for which such alleged overpayment has been made, for a correction of the amount so paid by him to the department and for a refund of the amount which he claims has been illegally collected and paid. In such petition, he shall set forth the amount which he claims should be refunded, and the reasons for such claim. The department shall promptly consider such petition, and may grant such refund, in whole or in part, or may wholly deny the same. If denied in whole or in part, the petitioner shall be forthwith notified of such action of the department, and of its grounds for such denial. The department may, in its discretion, grant the petitioner a further hearing with respect to such petition. Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in any proper action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected; Provided, however, That no court shall entertain such a suit, unless the taxpayer shall show that he has

filed a petition for refund with the department, as hereinabove provided, within one year prior to the institution of the action: **Provided, further,** That no such suit shall be entertained until the expiration of six months from the time of the filing of such petition for refund with the department, unless in the meantime, the department shall have notified the petitioner, in writing, of the denial of such petition. Any such petition shall be subject to the provisions of section 11 (b). In every such action, a copy of the complaint shall be served upon the department, with the summons, which summons shall be so served at least fifteen (15) days before the return date thereof. It shall not be necessary for any taxpayer to protest against the payment of the tax in order to maintain such suit. In any suit to recover taxes paid, or to collect taxes, imposed under the provisions of this act, the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

(b) Either party to such suit shall have the right to appeal, as now provided by law in civil cases. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the treasurer in favor of such taxpayer, to pay such judgment, interest and costs. It shall be the duty of the treasurer to honor such warrant and pay such judgment out of any funds in the state treasury not otherwise appropriated.

Sec. 21. On or before the fifth day of each month the total amount received from taxes levied under the provisions of this act during the preceding month shall be paid by the department into the state treasury and credited to the general fund.

Sec. 28. The administration of this act is vested in and shall be exercised by the department of treasury, except as otherwise herein provided. Such administration shall be under the supervision of the director, and all notices, summons, warrants, waivers, demands, and other written documents except as otherwise provided in section 29, shall be signed by him, and when so signed shall be regarded as the official acts of the department. The enforcement of any of the provisions of this act in any court shall be under the direction of the Department. The director may require the assistance of, and act through, the prosecuting attorney of any county, and may, with the assent of the governor, employ special counsel in any county to aid the prosecuting attorney, the compensation of whom shall be fixed by and paid only upon the approval of the governor; but the prosecuting attorney of any county shall receive no fees or compensation for services rendered in enforcing this act, in addition to the salary paid to such officer. The director, with the approval of the governor, may appoint, as needed, such counsel, agents, clerks, stenographers, and other employees as authorized by law, who shall serve under him, shall perform such duties as may be required, not inconsistent with this act, and are hereby authorized to act for the department as the director may prescribe and as provided herein. In case of violation of the provisions of this act, the department may decline to prosecute for the first offense, if, in the judgment of the director, such violation is not willful or flagrant.

APPENDIX B

Constitution of Indiana (1852)

Art. 4, Sec. 24. Suits Against the State. Provision may be made, by general law, for bringing suit against the State, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed.

2 Burns' Indiana Statutes (1933)

4-1501 (1550). Claims Against State—Where Suit May Be Brought. Any person or persons having or claiming to have a money demand against the state of Indiana, arising, at law or in equity, out of contract, express or implied, accruing within fifteen (15) years from the time of the commencement of the action, may bring suit against the state therefor in the superior court of Marion County, Indiana, by filing a complaint with the clerk of the said court and procuring a summons to be issued by said clerk, which summons shall be served upon the attorney-general of Indiana thirty (30) days before the return day of the summons; and jurisdiction is hereby conferred upon said superior court of Marion County, Indiana, to hear and determine such action, and said court shall be governed by the laws, rules and regulations which govern said superior court in civil actions in the making up of issues, trial and determination of said causes, except that the same shall be tried by all the judges of said court sitting together without a jury: Provided, That suit may be brought upon any claim falling within the class described in this section, without reference to the time when such claim

accrued, in case such claim be based upon any written warrant, voucher or certificate properly issued and signed, under authority of law, by any board of directors or control in charge of the construction of the northern Indiana state prison. (Acts 1889, ch. 128, § 1, p. 265; 1895, ch. 112, § 1, p. 231).

APPENDIX C**11 Burns' Indiana Statute (1943 Replacement), 58-801
Uniform Conditional Sales Act**

Definitions. In this act, "conditional sale" means (1) any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (2) any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon full compliance with the terms of the contract.

APPENDIX D

**Sales Contract Involved in Department of Treasury v.
International Harvester Company (1943), 221 Ind. 416**

"SALE CONTRACT AND PRICE SCHEDULE

Dated, 19.....

TO

International Harvester Company of America

The undersigned, the Purchaser, hereby orders of said Company the goods marked as ordered in the list made a part of this contract, and requests that the same be shipped to
at
on or about the date or dates indicated herein.

In consideration of the acceptance of this order, the Purchaser agrees to all the terms, conditions and provisions of this contract, as follows:

1. To accept delivery of said goods at points of shipment, receive the same on arrival, pay all freight charges thereon from the f. o. b. point or points named in the price schedules, and settle for the same at the dates, terms and prices designated in the price schedules attached hereto. The Purchaser shall pay for said goods in cash on or before the dates specified, and if not then paid, shall pay interest on such purchase price at the rate of per cent

per annum and shall at any time upon the company's request execute and deliver a bankable note or notes for the purchase price of said goods or any of them, said notes to mature at the dates herein agreed upon for payment and to draw interest thereafter at the above named rate.

2. The title to all goods shipped under this contract, with right of repossession for default, is reserved by the Company until the Purchaser has made full payment in cash for all of said goods and for all notes given therefor. Prior to full settlement in cash the Purchaser shall have no right to sell or dispose of any goods delivered hereunder except for value received in the ordinary course of trade and upon the express condition that prior to the delivery of any of said goods to a customer, the Purchaser shall secure from said customer a full settlement in cash or goods and bankable notes and that the proceeds of all resales shall be considered the property of the company in lieu of the goods so sold and held in trust for it and subject to its order, as provided in paragraph four hereof, until all sums due under this contract have been fully paid. At any time on request the Purchaser will give the company's representatives full information regarding goods on hand, goods sold and the proceeds thereof, to enable it to ascertain and enforce its reserved rights under this clause. Nothing herein shall release the Purchaser from payment for all goods ordered and delivered hereunder and after delivery to him said goods shall be held at his risk and expense in respect to loss or damage from any cause and taxes and charges of every kind.

3. Warranty. (On all goods covered by this contract except Farm Trucks and Wagons: Wagon warranty is given on page 158.) The Company will furnish the Pur-

chaser with a supply of printed forms for use in reselling the goods ordered hereunder and containing written warranties applicable to the several kinds of goods. In all cases where the Purchaser gives his customer a written warranty in the form suggested, the company **will protect** the Purchaser and stand back of him in giving such warranty. This agreement, however, is conditioned on the Purchaser giving the Company's Branch Manager prompt written notice of any claim or complaint by a customer. The Company shall be under no liability whatever except where a written warranty is given in said approved form without addition or alteration of any kind, and shall be released from all liability hereunder in case the Purchaser shall, without its consent, waive compliance by his customer with any of the conditions of said warranty. The Company reserves the right to change the form of warranty in any of said order blanks at any time. The net price (but no freight or express charge) of any parts which the Purchaser is liable to furnish and shall furnish a customer in fulfillment of any such warranty may be charged back to the Company, but in all such cases the broken or defective parts must be exhibited at settlement time to the authorized agent of the Company and returned to the Company, if requested. This agreement is given and accepted in lieu of all other warranties, expressed or implied.

4. Upon request of the Company at any time the Purchaser agrees to turn over, endorse and assign to the Company a quantity of customers' notes, or, if notes are not available, then customers' accounts sufficient to fully cover and secure all indebtedness of the Purchaser hereunder, such notes and accounts to be held as collateral security to said indebtedness. Payment of said customers' notes and accounts at maturity is guaranteed by the Purchaser

and presentation, demand, protest, notice of protest and diligence are waived both as to makers and endorsers. In case of default in payment of any said collateral notes or accounts, the Purchaser agrees to remit cash for full amount of same together with interest and collection charges within 15 days after maturity. All collections on collateral notes or accounts are to be credited on the note or notes or account of the Purchaser first becoming due. On payment of Purchaser's indebtedness in full, all collateral notes or accounts remaining in possession of the Company are to be returned.

5. The Purchaser further agrees that all repairs and extras for the goods specified, ordered and furnished hereunder shall be received and paid for at the prices quoted in the Company's latest repair price lists to dealers on the following terms:

Net cash two months from 1st day of the month succeeding month of shipment, with interest after maturity, subject to discount of 5 per cent for cash if paid on or before the 1st day of the month succeeding month of shipment. Purchaser to pay all transportation charges on same from point of shipment except that if repairs are shipped from Branch Houses or Transfer points in or west of the States of Montana, Wyoming, Colorado or New Mexico, an additional charge of 10% will be made. The Purchaser agrees to order a sufficient quantity of repairs for all lines of goods handled hereunder to take care of the trade in the aforesaid territory during the term of this contract.

6. The Purchaser agrees to examine all goods on arrival and notify the Company of all claims on account

of shortage, defective or damaged goods or parts, within ten days after receipt of goods, and failing so to do the Company is not to be held responsible therefor. The Company shall have a reasonable time in which to make good any shortage or defective or damaged goods or to furnish parts to replace defective parts for which it is responsible.

7. All shipments are to be routed as the Company may direct, and the Company will use its best efforts to make shipments on or before the dates specified, but it shall not be responsible for failure to ship goods on time or to fill orders, where it is prevented by act of God, or by fire or other elements, or by riots, strikes, labor disturbances, or by the law or the decree or judgment of any court, or if the demand for any goods shall exceed the Company's available supply, or by any cause beyond the Company's reasonable control; nor shall the Company be liable for any delay, damage or loss occurring after delivery of goods to carrier, and all claims for damage in transit shall be made direct by the Purchaser against carrier.

8. In addition to the goods now ordered, all goods heretofore or hereafter shipped to the Purchaser, between the date of November 1, 1933, and October 31, 1936, both inclusive, shall be considered as sold under this contract, and subject to all of its provisions, except as different prices or terms have been or may be agreed upon at the time, and it is understood that the Company reserves the right to reject any orders for additional goods, or to change the prices and terms applicable thereto.

9. Cancellation or reduction in the amount of the original or any subsequent orders placed and accepted hereunder without the consent of the Company, or refusal to accept shipment of any goods in time for the 1936 selling season, shall be ground for termination of this contract

by the Company and refusal to furnish any further goods hereunder, the Purchaser, however, remaining liable to settle for all goods previously shipped in accordance with the terms hereof.

10. The Dealer agrees to reimburse the Company for any and all sales or excise taxes, whether imposed by Federal, State or local laws, which it may be required to pay or to reimburse to others by reason of the manufacture, purchase or sale of any goods delivered under this contract. The amount of said tax may be billed as a separate item or included in the invoice price of the goods at the Company's option.

11. The prices quoted herein are not guaranteed to be effective after June 1, 1936, and goods shipped after that date shall be paid for at the Company's price to dealers then in effect in Purchaser's territory.

12. In all cases where the attached schedules permit goods unsold at maturity date to be carried on extended terms to a subsequent year, it is understood that this is conditional on the prices on such carried-over goods being readjusted to conform with the Company's prices for similar goods in effect at the maturity date applicable to said goods.

13. It is understood that this order is taken subject to the acceptance of the Company's Branch Manager having charge of the district in which the Purchaser's principal place of business is located and that this contract contains the entire agreement between the parties with reference thereto, and that there shall not be any change in any of the prices, terms or conditions printed herein, unless such change is made and accepted in writing, by said Branch Manager. The copy of this contract retained by the Company shall be considered the original and shall control in

case of any variation between it and the duplicate retained by the Purchaser. The company's rights under this contract may be assigned to any affiliated Company. The Purchaser's rights under this contract shall not be assigned without the consent of the Company's Branch Manager. All indebtedness created under this contract shall be payable at the Company's Branch House named below.

Purchaser's

Signature

Witnesses:

(Traveler)

Accepted at

(Fill in Town and State) (Branch House)

....., 19.....

INTERNATIONAL HARVESTER COMPANY,

of America

(Incorporated)

By

(Branch Manager)

PRICE GUARANTEE

If the International Harvester Company of America should reduce its prices to dealers on any of the various classes of goods covered by this contract, on or before the cash discount dates for said class of goods, as stated in the terms schedule herein contained, it agrees to adjust to such lower basis the prices of any complete machines of the class affected which were purchased under this contract and which remain unshipped or on hand unsold in the possession of the dealer at the time such price change becomes effective.

APPENDIX E

Taxpayer's Complaint in Department of Treasury v. Loose-Wiles Biscuit Company (1943), 221 Ind. 248, Alleged as One Ground for Refund of Gross Income Tax

"The plaintiff's receipts or proceeds from such transactions were not received in the State of Indiana and do not constitute receipts subject to the provisions and terms of the aforesaid Gross Income Tax Act."

The facts in that case were stipulated as follows:

"From plaintiff's distribution center at Indianapolis, Indiana, goods were furnished to customers in Warren, Tippecanoe, Carroll, Cass, Howard, Clinton, Tipton, Madison, Hamilton, Boone, Montgomery, Fountain, Parke, Owen, Morgan, Johnson, Shelby, Bartholomew, Brown, Monroe and parts of Sullivan and Greene Counties in Indiana not served by Evansville.

The respective territories in Indiana allocated by plaintiff to plaintiff's several bakeries and distribution centers, as hereinabove described, are shown on the maps attached hereto, marked "Exhibit A-1, A-2, A-3" and made a part hereof.

Plaintiff sells its products at wholesale to retail dealers who resell the same to the ultimate consumers. Plaintiff's products are semi-perishable in the sense that they deteriorate and become unsatisfactory for sale. The plaintiff recommends sales of their products by retailers within thirty to sixty days after manufacture, but in some instances some retailers have stock and make sales as much as one hundred and twenty days after manufacture. It

is advantageous to the plaintiff and necessary for its customers to make delivery of goods as quickly as possible. It is the practice of the plaintiff not to maintain stocks in its distribution centers or at its bakeries for longer than one week after the same are baked. The retail dealers do not carry large stocks of plaintiff's goods, and therefore require frequent service and rapid delivery on their orders to the plaintiff. On account of this condition, and the necessity for economy in transportation and delivery of the goods, and the necessity of meeting conditions arising out of competition with manufacturers of similar products whose bakeries or distribution centers are located conveniently to plaintiff's markets, the several territories in Indiana have been established and allocated by plaintiff to its respective bakeries and distribution centers as above described for the purpose of enabling plaintiff to provide prompt delivery of its products and meet its competition in the manner most satisfactory and most conducive to successful operation of its business.

The course of business practiced by plaintiff during the taxable period in respect to furnishing goods to its customers in the State of Indiana from its bakeries and distribution centers located outside of, said State, and the collection of payment for such products, has uniformly been as follows:

In conjunction with its bakeries at Chicago and Dayton, and at its distribution centers in Cincinnati and Louisville, plaintiff at each of said places employs a manager who is termed a "sales agent" and who has certain authority over other employees in respect of sales, deliveries, collections and the accounting in relation thereto; also, salesmen who work out of such bakery or distribution center and solicit

orders in Indiana from the retailers located in the Indiana counties assigned by plaintiff to such bakery or distribution center; also, shipping clerks who assemble the orders, office employees who take care of the billing of the orders and handle the office details, and drivers who operate the trucks for delivery of such of the orders as are delivered by plaintiff's own equipment.

Orders for plaintiff's products are taken thus:

The salesman calls on the retailer in Indiana, solicits the order, and writes the order in the presence of the customer on a triplicate (carbon copy) order form, on which is written the name and address of the customer, the quantity, kind of package, name of article, weight, and price of products ordered. A typical copy of this form, filled in to indicate the nature of the entries, is attached hereto, marked "Exhibit B" and made a part hereof.

The salesman forwards all three copies of this order to the bakery or distribution center from which he is working. The total prices of the products ordered are there computed and extended in the last column of the order form. The original copy of the order form is then used as an invoice, and is delivered or sent to the customer concurrently with delivery of the products ordered. The second copy of the order form is retained at the point of shipment, and the triplicate copy is used for obtaining the signature of the retailer showing receipt of the goods in cases where delivery of the goods is made by plaintiff's own truck.

Operators of the delivery trucks also at times accept orders, which, when obtained, are handled and filled in the same manner as other orders.

In filling such orders, transportation of the goods from the bakery or distribution center outside the State of Indiana to the customer located in the State of Indiana, is in approximately 90% of the transactions made by plaintiff's own trucks, and in approximately 10% of the transactions by independent transportation companies. In case of delivery by plaintiff's truck, the driver takes along the original and third copies of the order, obtains the retailer's signature of delivery on the triplicate copy, which is returned to plaintiff's office from which the goods were sold and delivered, and the original copy is left with the retailer as his bill or invoice.

In case of shipment by an outside transportation company, a form entitled (at the top) "Uniform Domestic Straight Bill of Lading" is filled out in triplicate. A copy of such bill of lading form, filled in to show a hypothetical transaction, is attached hereto, marked "Exhibit C-1, C-2 and C-3" and made a part hereof. The original copy of this bill of lading (also entitled "shipping order") is delivered to and retained by the transportation company or its agent; the second copy (first carbon, also entitled "memorandum") remains at the office of the plaintiff; and the third copy (second carbon) is sent by mail direct to the purchaser of the goods, together with the invoice for the same.

Collection of payment from the customer for the products sold and delivered to him is made as follows:

In certain instances where delivery in Indiana is made by plaintiff's own truck, the invoice is taken to the purchaser by the driver when the goods are delivered, and the customer makes payment to the driver in the form of cash or checks which are returned by the driver to the

bakery or distribution center outside of Indiana from which the goods were furnished, and in other instances the Indiana customer pays plaintiff's salesman in Indiana in cash or by check when further orders are given when he calls at the store, which checks are forwarded by the salesman to the distribution center with which he is connected, pursuant to plaintiff's orders. Where delivery is made by an independent transportation company, the invoice is sent by mail to the customer, who sends check in payment thereof direct to plaintiff's bakery or distribution center from which the goods were furnished. In no case is the cash or checks representing payments for plaintiff's goods furnished from a point outside of the State of Indiana deposited or negotiated in said State.

All of plaintiff's customers in the State of Indiana who are served from points outside of the State of Indiana have knowledge that at the time of giving their orders that plaintiff operates no bakery in the State of Indiana; that the salesman who takes the order is working from the bakery or distribution center located outside of the State; and that the goods will be delivered from a bakery or distribution center located outside of the State of Indiana in the usual course of business.

The method of doing business pursued by plaintiff during the taxable period, as above described, was established and followed prior to enactment of the Gross Income Tax Act and its effective date of May 1, 1933, and is still pursued by plaintiff. The only material alteration in plaintiff's method of doing business within the State of Indiana was during the period of temporary existence of the Fort Wayne distribution center as hereinabove stated.

During the taxable period, plaintiff did not have any bakeries in the State of Indiana, and all bakery goods delivered to customers in Indiana came from bakeries outside of the State of Indiana, either directly or through the Indianapolis, Evansville, Fort Wayne or South Bend distribution centers as defined specifically above. In order to serve customers within the State of Indiana from points within the State of Indiana, plaintiff would have had to establish within the State of Indiana additional warehouses and offices, obtain additional trucks and equipment, and hire additional employees, and to otherwise entirely alter its method of doing business. Such a change would make necessary the double handling of goods now shipped direct and would delay delivery of semi-perishable goods.

DEC 14 1944
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 75

FORD MOTOR COMPANY,
Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON, and FRANK G. THOMPSON, As and Constituting the Department of Treasury of the State of Indiana,
Respondents.

**RESPONDENT'S SUPPLEMENTAL MEMORANDUM
AND MOTION FOR LEAVE TO FILE SAME**

JAMES A. EMMERT,
The Attorney General of Indiana,
WINSLOW VAN HORNE,
Deputy Attorney General of Indiana,
JOHN J. McSHANE,
Deputy Attorney General of Indiana,
Attorneys for Respondent.

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Respondents.

**RESPONDENT'S MOTION FOR LEAVE TO FILE
SUPPLEMENTAL MEMORANDUM**

Respondent moves that it be permitted to file memorandum in answer to the supplemental memorandum filed by petitioner pursuant to leave obtained upon argument of this cause, concerning the application to this cause of the decision in *Spector Motor Service, Inc. v. McLaughlin* and tenders herewith a copy of such memorandum.

JAMES A. EMMERT,

The Attorney General of Indiana,

WINSLOW VAN HORNE,

Deputy Attorney General of Indiana,

JOHN J. McSHANE,

Deputy Attorney General of Indiana,

Attorneys for Respondent.

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Respondents.

RESPONDENT'S SUPPLEMENTAL MEMORANDUM

Respondent does not here contend that this cause should or should not be remanded under the decision rendered December 4, 1944, in Cause No. 62, *Spector Motor Service, Inc. v. McLaughlin*. However, the respondent does contend that if this cause be remanded such remand should be with directions to the District Court to dismiss the action, leaving the parties to their remedies in the state court, if any.

This contention is founded upon the following argument: Jurisdiction in this cause was founded upon the dual grounds of diversity of citizenship and the existence of a federal question. (Record 2.) All federal questions have at this point been abandoned and no question concerning

the constitution or laws of the United States is presented.

(*Petition for Writ of Certiorari*, pp. 2 and 13.) The respondent, defendant below, is in name, substance and fact the State of Indiana and the action is solely against the State of Indiana in its sovereign capacity. (*Respondent's Brief*, pp. 3-4.) If the action had been filed originally solely upon the jurisdictional basis of diversity of citizenship, the District Court would not have had jurisdiction, as the state is not a citizen. *Postal Telegraph Cable Company v. Alabama* (1894), 155 U. S. 482, 486-488.

Upon remand of this cause it is not conceivable that the petitioner would be permitted to urge the federal questions which it has waived and abandoned and the action would then be no different than if the cause had originally been submitted to the District Court solely upon the jurisdictional ground of diversity of citizenship. (The District Court would have no jurisdiction to proceed, and its only power would be to dismiss the action for want of jurisdiction.

Therefore, this court should instruct the District Court to dismiss the cause in the event of a remand.

In the absence of any such instructions to the District Court to dismiss, then, in the event that this cause is remanded to the district Court, the respondent respectfully suggests that the mandate of this court preserve to the respondent the finality of the decisions of the District Court and Court of Appeals upon the federal questions decided by such courts and not questioned in this appeal.

Respectfully submitted,

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Deputy Attorney General of Indiana,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 75.—OCTOBER TERM, 1944.

Ford Motor Company, Petitioner,	} On Writ of Certiorari to	
vs.		the United States Circuit
Department of Treasury of the State of Indiana, et al.		Court of Appeals for the Seventh Circuit.

[January 8, 1945.]

Mr. Justice REED delivered the opinion of the Court.

This writ brings here for review an action by petitioner, a non-resident foreign manufacturing corporation, against the respondents, the department of treasury of the State of Indiana and M. Clifford Townsend, Joseph M. Robertson¹ and Frank G. Thompson, the Governor, Treasurer and Auditor, respectively, of the State of Indiana, who "together" constituted the board of the department of treasury.¹ Petitioner seeks a refund of gross income taxes paid to the department and measured by sales claimed by the state to have occurred in Indiana.² Jurisdiction of the United States District Court is founded on allegations of the violation of Article I, Section 8, the Commerce Clause, and the Fourteenth Amendment of the Constitution. The state statutory procedure for obtaining a refund which petitioner followed is set forth in Section 64-2614(a) of the Indiana statutes.³

¹ We need not consider the present status of the board of the department of treasury. ~~§~~ 64-2614, Burns, Indiana Stat. Ann. (1943 Replacement), provides for suit against the "department." See Indiana, Acts, 1933, ch. 4, § 13; Indiana, Acts, 1941, ch. 4 and ch. 13, §§ 2, 8; *Tucker v. State*, 218 Ind. 614. ad

² Burns, Indiana Stat. Ann. § 64-2602 (1943 Replacement).

³ Section 64-2614(a) of Burns, Indiana Stat. Ann. (1943 Replacement) provides:

"If any person considers that he has paid to the department for any year an amount which is in excess of the amount legally due from him for that year under the terms of this act, he may apply to the department, by verified petition in writing, at any time within three (3) years after the payment for the annual period for which such alleged overpayment has been made, for a correction of the amount so paid by him to the department, and for a refund of the amount which he claims has been illegally collected and paid. In such petition, he shall set forth the amount which he claims should be refunded, and the reasons for such claim. The department shall promptly consider such petition, and may grant such refund, in whole or in part, or may wholly deny the same. If denied in whole or in part, the petitioner shall be forthwith

The District Court denied recovery. The Circuit Court of Appeals affirmed.⁴ Certiorari was granted⁵ on petitioner's assertion of error in that the Circuit Court of Appeals decided an important question of local law probably in conflict with an applicable decision of the Supreme Court of Indiana. *Department of Treasury v. International Harvester Co.*, 221 Ind. 416. As we conclude that petitioner's action could not be maintained in the federal court, we do not decide the merits of the issue.

Petitioner's right to maintain this action in a federal court depends first, upon whether the action is against the State of Indiana or against an individual. Secondly, if the action is against the state, whether the state has consented to be sued in the federal courts. Recently these questions were discussed in *Great Northern Insurance Co. v. Read*, 322 U. S. 47.

In that case this Court held that as the suit was against a state official as such, through proceedings which were authorized by statute to compel him to carry out with state funds the state's agreement to reimburse moneys illegally exacted under color of the tax power, the suit was one against the state. We said that such a suit was clearly distinguishable from actions against a tax collector to recover a personal judgment for money wrongfully collected under color of state law. 322 U. S. 47, 50-51. Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally. *Atchison, T. & S. F. Ry. Co. v. O'Connor*, 223 U. S. 280; cf.

notified of such action of the department, and of its grounds for such denial. The department may, in its discretion, grant the petitioner a further hearing with respect to such petition. Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in any proper action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected: Provided, however, That no court shall entertain such a suit, unless the taxpayer shall show that he has filed a petition for refund with the department, as hereinabove provided, within one (1) year prior to the institution of the action: Provided, further, That no such suit shall be entertained until the expiration of six (6) months from the time of filing such petition for refund with the department, unless in the meantime, the department shall have notified the petitioner, in writing, of the denial of such petition. . . ."

⁴ *Ford Motor Co. v. Department of Treasury of State of Indiana, et al.*, 141 F. 2d 24.

⁵ 322 U. S. 721.

Matthews v. Rodgers, 284 U. S. 521, 528. Where, however, an action is authorized by statute against a state officer in his official capacity and constituting an action against the state, the Eleventh Amendment operates to bar suit except in so far as the statute waives state immunity from suit. *Smith v. Reeves*, 178 U. S. 436; *Great Northern Insurance Co. v. Read*, 322 U. S. 47.

We are of the opinion that petitioner's suit in the instant case against the department and the individuals as the board constitutes an action against the State of Indiana. A state statute prescribed the procedure for obtaining refund of taxes illegally exacted, providing that a taxpayer first file a timely application for a refund with the state department of treasury.⁶ Upon denial of such claim, the taxpayer is authorized to recover the illegal exaction in an action against the "department." Judgment obtained in such action is to be satisfied by payment "out of any funds in the state treasury."⁷ This section clearly provides for an action against the state, as opposed to one against the collecting official individually. No state court decision has been called to our attention which would indicate that a different interpretation of this statute has been adopted by state courts.

Petitioner's suit in the federal District Court is based on § 64-2614(a) of the Indiana statutes and therefore constitutes an action against the state, not against the collecting official as an individual. Petitioner brought its action in strict accord with § 64-2614(a). The action is against the state's department of treasury. The complaint carefully details compliance with the provisions of § 64-2614(a) which require a timely application for refund to the department as a prerequisite to a court action authorized in the section. It is true the petitioner in the present proceeding joined the Governor, Treasurer and Auditor of the state as defendants, who "together constitute the Board of Department of Treasury of the State of Indiana." But, they were joined as the collective representatives of the state, not as individuals against whom a personal judgment is sought. The petitioner did not assert any claim to a personal judgment against these individuals for the contested tax payments. "The petitioner's claim is for a "refund," not for the imposition of personal liability on individual defendants for sums illegally exacted. We

⁶ See note 3 *supra*, § 64-2614(a).

⁷ Burns, Indiana Stat. Ann. § 64-2614(b) (1943 Replacement).

have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. *Ex parte Ayers*, 123 U. S. 443, 490-99; *Ex parte New York*, 256 U. S. 490, 500; *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 296-98. And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. *Smith v. Reeves*, *supra*; *Great Northern Insurance Co. v. Read*, *supra*. We are of the opinion, therefore, that the present proceeding was brought in reliance on § 64-2614(a) and is a suit against the state.

It remains to be considered whether the State of Indiana has consented to this action against it in the federal court.

The Eleventh Amendment provides that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." This express constitutional limitation denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent. *Hans v. Louisiana*, 134 U. S. 1, 10; *Ex parte New York*, 256 U. S. 490, 497; *Missouri v. Fiske*, 290 U. S. 18, 25; *United States v. United States Fidelity & G. Co.*, 309 U. S. 506, 512; *Great Northern Insurance Co. v. Read*, *supra*; *State v. Mutual Life Ins. Co.*, 175 Ind. 59, 71; *Hogston v. Bell*, 185 Ind. 536, 548. While the state's immunity from suit may be waived; *Clark v. Barnard*, 108 U. S. 436, 447; *Gunter v. Atlantic Coast Line*, 200 U. S. 273; *Missouri v. Fiske*, 290 U. S. 18, 24, there is nothing to indicate authorization of such waiver by Indiana in the present proceeding.

Section 64-2614(a) authorizes "action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected." In the *Read* case we construed a similar provision of an Oklahoma tax refund statute as a waiver of state immunity from suit in state courts only. 322 U. S. 47, 54. As was said in that case: "When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system

for the federal courts to be astute to read the consent to embrace federal as well as state courts . . . when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found." (Cf. *United States v. Shaw*, 309 U. S. 495, 501. Section 64-2614 does not contain any clear indication that the state intended to consent to suit in federal courts.⁸ The provision in this section which vests original jurisdiction of suits for refund in the "circuit or superior court of the county in which the taxpayer resides or is located" indicates that the state legislature contemplated suit in the state courts.⁹ Moreover, this interpretation of § 64-2614(a) to authorize suits only in state courts accords with the state legislative policy. Indiana has adopted a liberal policy toward general contract claimants but confines their suits against the state to state courts.¹⁰

It remains to be considered whether the attorney general for the State of Indiana in his conduct of the present proceeding has waived the state's immunity from suit. The state attorney general is authorized to represent the state in actions brought

⁸ Section 60-310, Burns, Indiana Stat. Ann. (1943 Replacement), (Acts, 1941, ch. 27, § 1, p. 64), provides for the creation of a state board of finance. This section reads, in part, as follows: "Such board may sue, and be sued in its name, in any action, and in any court having jurisdiction, whenever necessary to accomplish the purposes of this act."

It does not appear that the right to sue the department of treasury for erroneous tax payments, which was granted by § 64-2614(a), Burns, Indiana Stat. Ann. (1943 Replacement) (see Acts, 1937, ch. 117, § 14, pp. 631-32) has been repealed or transferred to the state board of finance by the Acts, 1941, ch. 27, or otherwise.

If it is held by Indiana that the state's consent to be sued for the recovery of taxes was covered by § 60-310 rather than by § 64-2614(a), we should be of the opinion, until otherwise advised by Indiana adjudications, that the consent was limited to suits in the state courts.

Chapter 27 of the Acts of 1941, which creates the state board of finance, apparently invests the board with control over public funds rather than with the collection and refund of taxes.

⁹ Reference to a particular state court in a California statute similar to § 64-2614 was held to warrant an inference that the state legislature consented to suit against the state in a state court only. See *Smith v. Reeves*, 178 U. S. 436, 441.

¹⁰ Burns, Indiana Stat. Ann. § 4-1501 (1933), provides:

"Any person or persons having or claiming to have a money demand against the state of Indiana, arising, at law or in equity, out of contract, express or implied, . . . may bring suit against the state therefor in the superior court of Marion County, Indiana, . . . and jurisdiction is hereby conferred upon said superior court of Marion County, Indiana, to hear and determine such action"

under the Indiana refund statute.¹¹ He appeared in the federal District Court and the Circuit Court of Appeals and defended the suit on the merits. The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court.

It is conceded by the respondents that if it is within the power of the administrative and executive officers of Indiana to waive the state's immunity, they have done so in this proceeding. The issue thus becomes one of their power under state law to do so. As this issue has not been determined by state courts,¹² this Court must resort to the general policy of the state as expressed in its Constitution, statutes and decisions. Article 4, Section 24 of the Indiana Constitution provides:

"Provision may be made, by general law, for bringing suit against the State, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed."

We interpret this provision as indicating a policy prohibiting state consent to suit in one particular case in the absence of a general consent to suit in all similar causes of action. Since the state legislature may waive state immunity only by general law,

¹¹ Section 64-2614(c) provides:

"It shall be the duty of the attorney-general to represent the department, and/or the state of Indiana, in all legal matters or litigation, either criminal or civil, relating to the enforcement, construction, application and administration of this act, upon the order and under the direction of the department."

¹² State *ex rel. Woodward v. Smith*, 95 Ind. App. 56, is the only Indiana decision which has come to our attention as involving the authority of state executive or administrative officials to consent to suit against the state. In that case plaintiff sued to foreclose a mortgage on certain land and joined the state of Indiana as defendant in order to obtain cancellation of a prior judgment lien on this property in favor of the state. The defendant state filed a cross-complaint for affirmative relief, seeking satisfaction of its lien. The intermediate state court held that since the state appeared, pleaded to the merits and filed a cross-complaint for affirmative relief, it thereby consented that it might be made a party to determine the priority of its lien. This case involves an application of the well-accepted principle that when a sovereign sues for affirmative relief, it is deemed to have waived its sovereign immunity as to the issues presented by its affirmative claim. *State v. Portsmouth Savings Bank*, 106 Ind. 435.

it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative or executive officers discretionary power to grant or withhold consent in individual cases. Nor do we think that any of the general or special powers conferred by statute on the Indiana attorney general to appear and defend actions brought against the state or its officials can be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued.¹³ State court decisions construe strictly the statutory powers conferred on the Indiana state attorney general and hold that he exercises only those powers "delegated" to him by statute and does not possess the powers of an attorney general at "common law."¹⁴ It would seem, therefore, that no properly authorized executive or administrative officer of the state has waived the state's immunity to suit in the federal courts.

Gunter v. Atlantic Coast Line, 200 U. S. 273, is not applicable to the instant case since it involved a taxpayer's ancillary

¹³ Section 4-1504, Burns, Indiana Stat. Ann. (1933) authorizes the state attorney general to represent the state in actions brought against it under § 4-1501, see note 10, *supra*; it provides:

"It shall be the duty of the attorney-general of state, in person or by deputy, to defend and represent the interests of the state in said superior court of Marion County, Indiana, and also in the Supreme Court on appeal."

Section 49-1902 provides generally:

"Such attorney-general shall prosecute and defend all suits that may be instituted by or against the state of Indiana, the prosecution and defense of which is not otherwise provided for by law, whenever he shall have been given ten (10) days' notice of the pendency thereof by the clerk of the court in which such suits are pending, and whenever required by the governor or a majority of the officers of state, in writing, to be furnished him within a reasonable time; and he shall represent the state in all criminal cases in the Supreme Court, and shall defend all suits brought against the state officers in their official relations, except suits brought against them by the state; and he shall be required to attend to the interests of the state in all suits, actions or claims in which the state is or may become interested in the Supreme Court of this state."

Section 64-2614(c) specifically authorizes him to represent the state in actions brought under the provisions of § 64-2614(a) under which petitioner's suit is brought. See note 11, *supra*.

¹⁴ *State ex rel. v. Home Brewing Co.*, 182 Ind. 75, 87-95; *Julian et al. v. State*, 122 Ind. 68. Various lower federal court decisions have held that a state attorney general cannot waive state immunity from suit. *Deseret Water, Oil & Irr. Co. v. State of California*, 202 Fed. 498; *Title Guaranty & Surety Co. v. Guernsey*, 205 Fed. 91; *O'Connor v. Slaker*, 22 F. 2d 147; *Dunnuck v. Kansas State Highway Commission*, 21 F. Supp. 882. The United States Attorney General has been held to be without power to waive the sovereign immunity of the United States. *Stanley v. Schwalby*, 162 U. S. 255, 269-70; cf. *United States v. Shaw*, 309 U. S. 495, 501.

See *Richardson v. Fajardo Sugar Co.*, 241 U. S. 44, where, without consideration of any limitations on his powers, we held that the attorney general of Puerto Rico could waive its sovereign immunity.

suit to enjoin South Carolina tax officials from collecting taxes in violation of an earlier decision of this Court upholding the validity of a state agreement to exempt the taxpayer's property. *Humphrey v. Pegues*, 16 Wall. 244. The *Pegues* case involved a suit against the state in the person of its tax officials, the state attorney general appearing for the state and arguing the case on the merits, no issue of sovereign immunity being raised. In the *Gunter* proceeding, brought over twenty years later, defendant South Carolina attacked the validity of the *Pegues* judgment on the ground that in that proceeding the state had not consented to be sued. This Court held the *Pegues* judgment was res judicata and binding on the state because the South Carolina statutes conferred on the state officials and the attorney general power there to "stand in judgment for the state," 200 U. S. at 285, 286-87. The state's submission to the court was authorized by statute not by the unauthorized consent of an official. *Parish v. State Banking Board*, 235 U. S. 498, 512. No distinction was drawn between federal and state courts. Reliance was placed on contemporaneous administrative interpretation of the state statutes, absence of any legislative action repudiating the attorney general's conduct of the case and the failure of the state government in all its departments, for more than twenty years, to assert any right in conflict with the *Pegues* adjudication. Administrative construction by a state of its statutes of consent has influence in determining our conclusions. *Great Northern Insurance Co. v. Read*, *supra*.

As we indicated in the *Read* case, the construction given the Indiana statute leaves open the road to review in this Court on constitutional grounds after the issues have been passed upon by state courts. The advantage of having state courts pass initially upon questions which involve the state's liability for tax refunds is illustrated by the instant case where petitioner sued in a federal court for a refund only to urge on certiorari that the federal court erred in its interpretation of the state law applicable to the questions raised.

The judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court with directions to dismiss the complaint for want of consent by the state to this suit.

Mr. Justice MURPHY took no part in the consideration or decision of this case.